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No. 84-1985

In the Supreme Court of the United States

October Term, 1984

CITY OF EUCLID, OHIO,
Petitioner,
vs.
GRACE MABEL, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED FOR REVIEW

I. Where zoning regulations of a City permit certain signs for certain purposes regarded as accessory uses on private property located in residential use districts, i.e., signs offering the property "For Sale" or "For Rent", but prohibiting billboards, signboards or advertising signs in furtherance of aesthetics, maintaining property values, and maintaining a noncommercial atmosphere in residential neighborhoods, do the residential districts become as public forums wherein the 1st and 14th Amendments (U.S. Const.) require the City to permit political and other signs only be content neutral regulations applying to all signs?

II. Where zoning regulations of a City permit certain signs for certain purposes as stated above on private property in residential use districts, may the City classify without offense to the equal protection clause of the 14th Amendment (U.S. Const.) and the 1st Amendment (U.S. Const.) by different time, place and manner regulations as to placement of signs offering the real property on which they sit "For Sale" or "For Rent" and as to placement of political candidate signs where there are differences including differences in relationship to property and as to the respective times and needs for such signs, the alternate adequate channels for communicating the political message are many times greater than the former, and other health, safety and welfare factors are prevalent?

PARTIES BELOW

The Respondents are seven defendants, citizens of the City of Euclid, Ohio, who are the subject of criminal prosecution for violations of Section 1743.32(h) of City of Euclid Codified Ordinances restricting placing of political signs in residential neighborhoods. Their names are: Grace Mabel, V.T. Cicek, Casimir Choromanski, Jeane Zupanic, Carmen Tarantino, Phyllis Jordan and James Fratcher.

In the appeal to the Ohio Supreme Court, the following cases were consolidated: Case No. 84-1836, City of Euclid v. Grace Mabel; Case No. 84-1837, City of Euclid v. V.T. Cicek; Case No. 84-1838, City of Euclid v. Choromanski; Case No. 84-1839, City of Euclid v. Zupanic; Case No. 84-1840, City of Euclid v. Tarantino; Case No. 84-1841, City of Euclid v. Jordan; and Case No. 84-1842, City of Euclid v. Fratcher.

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No.

In the Supreme Court of the United States

October Term, 1984

CITY OF EUCLID, OHIO,
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GRACE MABEL, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Petitioner, the City of Euclid, Ohio, prays that a Writ of Certiorari issue to review the judgment of the Ohio Supreme Court entered on March 20, 1985, dismissing the appeal and overturning Appellant-Petitioner's Motion to Certify the Record to review the decision of the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District, filed on October 7, 1984, reversing the decision of the Euclid Municipal Court of Cuyahoga County, Ohio filed on November 25, 1983.

CITATIONS TO OPINIONS BELOW

The Journal Entry of the Ohio Supreme Court is reported at Vol. 16, Ohio Official Reports, No. 6, at p. A-3 (March 20, 1985), and is set forth in the Appendix, *infra*, at page A1. The Opinion of the Court of Appeals for Cuyahoga County, Ohio, Eighth Appellate District is unreported and is set forth in the Appendix, *infra*, at page A2. The Journal Entries of the Euclid Municipal Court of Cuyahoga County, Ohio, are unreported and are set forth in the Appendix, *infra*, at page A14.

JURISDICTION

The Judgment of the Ohio Supreme Court was rendered and filed on March 20, 1985. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Section 1257(3).

CONSTITUTIONAL AND CITY ORDINANCE PROVISIONS INVOLVED

United States Constitution Amendment I, see Appendix page A53.

United States Constitution Amendment X, see Appendix page A53.

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Ohio Constitution, Article XVIII, § 3, see Appendix page A57.

Euclid Codified Ordinance §1377.01(c), see Appendix page A58.

Euclid Codified Ordinance §1743.24, see Appendix page A58.

Euclid Codified Ordinance §1743.32(a), see Appendix page A58.

Euclid Codified Ordinance §1743.32(h), see Appendix page A59.

Euclid Codified Ordinance §1743.01, see Appendix page page A59.

STATEMENT OF THE CASE

This case arises from the criminal prosecution of seven (7) defendants, Grace Mabel, V.T. Cicek, Casimir Choromanski, Jeane Zupanic, Carmen Tarantino, Phyllis Jordan and James Fratcher, for violations of Section 1743.32(h) of the City of Euclid Codified Ordinances (E.C.O.) restricting the placement of political signs in residential neighborhoods. Upon appeal from conviction in these cases, the Court of Appeals held the ordinal provision in question to be unconstitutional.

The case relates to municipal regulations in single family residential use districts with respect to two types of temporary signs, to-wit: real estate signs which offer the private residential property on which they sit "For Sale" or "For Rent" and political signs. This case also relates to the right of a municipal corporation to differentially regulate the placement of such signs in a single family residential use district.

Euclid Codified Ordinances §1377.01(c) entitled, "Accessory Uses in Residential Districts", is a zoning provision which delineates as accessory uses "For Sale" or "For Rent" signs in a residential district. It provides:

> A billboard, signboard or advertising sign shall in no case be permitted as an accessory use. The placing

> of a "For Sale" or "For Rent" sign shall however be permitted as an accessory use. (Euclid, Ohio, Codified Ordinances §1377.01(c) [1976]).

Chapter 1743 of the Building Code in the E.C.O., entitled "Street Graphics", regulates all street graphics where permitted by zoning in the City of Euclid. Section 1743.24 of this chapter provides a ban on graphics in residential districts:

> No wall graphic, roof graphic, projecting graphic or pole-mounted graphic shall be permitted in any residential zoning district . . .

Section 1743.32 lists limited exemptions to this ban. Ordinance No. 75-1982 was enacted on April 5, 1982, by the Euclid City Council as Subsection "h" of the Section 1743.32 exemptions. It provides:

> Political graphics shall be permitted for a period of not more than seventeen (17) days before and five (5) days after an election, with the size of said graphics not to exceed two square feet in an area per graphic and said graphics to be located within an occupied residence as window graphics not to exceed two polical graphics per residence.[1]

A consideration of both E.C.O. 1743.32(h) and 1377.01 (c) is paramount to the total implication of regulation of signs within residential districts as applicable to the facts of this case.

Section 1743.01 of the Euclid Codified Ordinances states that:

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1. The constitutionality of similar provisions was also upheld in *City of East Cleveland v. Burroughs*, East Cleveland Municipal Court Case Nos. 78 CRB 695/1 and 696/1 on September 28, 1978, reproduced in Appendix (Appeal dismissed December 28, 1979, by Court of Appeals of Ohio, Eighth District, County of Cuyahoga in Case No. 40108).

The purpose of this chapter is to create the legal framework for a comprehensive but balanced system of street graphics, and thereby to facilitate an easy and pleasant communication between people and their environment. With this purpose in mind, it is the intention of this chapter to authorize the use of graphics which are:

(a) Compatible with their surroundings;

(b) Appropriate to the type of activity to which they pertain;

(c) Expressive of the identity of individual proprietors or of the community as a whole; and

(d) Legible in the circumstances in which they are seen.

In the within cases, consolidated for the purpose of this appeal, the respondents placed political signs in their yards or in their homes in violation of §1743.32(h) of the Codified Ordinances of the City of Euclid. Citations were issued by a police officer of the City of Euclid and complaints were signed by a building inspector of the City alleging such a violation.

The City has experienced difficulties relating to political lawn signs used during elections prior to a passage of §1743.32(h). Reports of vandalism, abuse by political rivals and property destruction have been associated with the signs. Additionally, the political signs are generally cheaply constructed with wood and cardboard and thus easily weather.

The real estate signs, however, have not been the subject of vandalism since they arouse little partisan emotion and animosity. They are also generally well constructed, usually with metal or heavy duty wood. Further,

political signs during an election may outnumber real estate signs by up to twenty times.

Prior to 1967, the aforesaid real estate signs were permitted. In 1967, the Ohio Supreme Court decided the case of *Peltz v. South Euclid,* 11 Ohio St. 2d 128 (1967), which was interpreted by the then law director to require the city to permit political signs in a residentially zoned use district, albeit that the city could regulate their placement. The Euclid Council made no change to the zoning code, since the exception appeared to be a judicial determination, but did adopt regulations under the building code to accommodate the decision and enforcement of the prior removal of political signs by the zoning commissioner was ceased whereas regulation of the placement of political signs was then undertaken by the building commissioner.

The placement of temporary political signs on lawns has always been an exception to the general regulations aimed at maintaining single family districts: free of unnecessary graphics not accessory or attendant to the permitted use and which caused a commercial type atmosphere; free of unsound structures that are a nuisance and detract from property values in the neighborhood; and free of obstructions that interfere with site distance, open space, set back and other yard requirements.

Prior regulations in the City of Euclid under the building code permitted political lawn signs around the time of an election in the Halloween-election season. The real estate signs which offer the property on which they sit for sale or for rent were permitted only while the property in question was for sale or for rent.

The objectives of the zoning and building codes banning or regulating the signs of interest are: to insure a non-commercial atmosphere in single and two family

residential use districts; to maintain open spaces by set backs and other yard requirements and to create an appropriate residential atmosphere and avoid obstructions to police view as a means of crime prevention; to permit only structures of sound construction so as to maintain the property values of the residential neighborhoods; to avoid construction which by its appearance degrades property value from an aesthetic point of view; to maintain the privacy of the home and limit what an unwilling viewer must be exposed to relative to the enjoyment of what is usually the biggest investment in his or her life, i.e., one's home.

On November 11, 1983, appellees were arraigned in Euclid Municipal Court and entered pleas of not guilty.

On November 15, 1983, appellees' Motions to Dismiss and oral argument based upon allegations of unconstitutionality were heard and overruled.[2]

On November 25, 1983, appellees entered pleas of no contest. By and through their counsel, facts underlying each appellee's conduct were brought to the attention of the Court. Each was subsequently found to have violated the ordinance and sentenced to a fine and costs.

The Eighth District Court of Appeals reversed the Euclid Municipal Court's conviction on the grounds that §1743.32(h) violated the First Amendment to the United States Constitution and Article I, Section 11 of the Ohio Constitution.

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2. The constitutionality of similar provisions was also upheld in *City of East Cleveland v. Burroughs*, East Cleveland Municipal Court Case Nos. 78 CRB 695/1 and 696/1 on September 28, 1978, reproduced in the Appendix (Appeal dismissed December 28, 1979, by the Court of Appeals of Ohio, Eighth District, County of Cuyahoga in Case No. 40108).

In a related case brought by counsel for defendants before the U.S. District Court, Northern District of Ohio, *Meros v. Euclid, Ohio,* 594 F. Supp. 259 (N.D. Ohio 1984), the Court held the same ordinal provision to be unconstitutional on an "equal protection" basis asserting that commercial speech (signs offering the real estate upon which they sit "For Sale" or "For Rent") is afforded greater protection (permitted on lawns) than noncommercial speech (political signs) at the same location (permitted only as window signs). The complaint in this case was brought pursuant to 42 U.S.C. §§1983 and 1988. This decision (reproduced in Appendix) on August 15, 1984, has been appealed to the U.S. Sixth Circuit Court of Appeals where the same is pending on Case No. 84-3786.

REASONS FOR GRANTING THE WRIT

I. A MUNICIPAL CORPORATION THROUGH ITS POLICE POWER AUTHORITY AND IN FURTHERANCE OF AESTHETICS AND MAINTAINING A NONCOMMERCIAL ATMOSPHERE IN RESIDENTIAL NEIGHBORHOODS MAY PERMIT CERTAIN SIGNAGE IN SUCH RESIDENTIAL DISTRICTS FOR LIMITED INFORMATIONAL PURPOSES ON PRIVATE RESIDENTIAL PROPERTY WITHOUT CREATING PUBLIC FORUMS THEREON REQUIRING THE CITY TO PERMIT ANY AND ALL OTHER SIGNS BE CONTENT NEUTRAL REGULATIONS APPLYING TO ALL SIGNS.

It is well known that the attainment of a quiet place where yards are wide, the people few, and motor vehicles restricted, is a reasonable goal of land use legislation and a clearly valid exercise of the police power. *Village of*

Euclid v. Ambler Realty, 272 U.S. 365 (1926); *Pritz v. Messer*, 112 Ohio St. 628 (1925); and *Village of Belle Terre v. Boraas*, 416 U.S. 1, 19 (1974). Respecting the latter case, in the opinion written by Justice Douglas, now deceased, historically one of the most avid advocates of the First Amendment, it is noteworthy that he referred to single-family districts as a "*sanctuary for people*", as distinguished from judicially approved, bird, wild life, and other sanctuaries created for non-human creatures:

> A quiet place where yards are wide, people are few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . the police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people. (*Id.* 416 U.S. 1, 19.)

The Constitution does not explicitly mention any right of privacy, but in a line of decisions, the U.S. Supreme Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution; these decisions make it clear that personal rights deemed fundamental or implicit in the concept of liberty are included in this guarantee of personal privacy. See *Roe v. Wade*, 410 U.S. 113, 152 (1973).

Legitimate zoning ordinances enacted pursuant to the police power override and may prohibit the uses and actions protected by the First Amendment of the United States Constitution as well as Article I, Section 11 of the Ohio Constitution. The state may limit speech when necessary to advance a significant and legitimate state interest. *Schenck v. United States*, 249 U.S. 47, 52 (1919). Interpretations of the Ohio constitutional provision must

yield to what is required by the United States Constitution respecting the First and Tenth Amendments thereof by virtue of "supremacy clause", Article VI, Clause II of the United States Constitution.

In the case of *Young v. American Mini Theaters*, 427 U.S. 50 (1976), the Supreme Court indicated that there was no doubt that a municipality may control the location of theaters (a First Amendment use) along with the location of other commercial establishments, either by confining them to certain specified zones or by requiring that they be disbursed throughout the city. The Court recognized that the principal question presented by the case was whether the statutory classification was unconstitutional because it was based on the content of communications protected by the First Amendment, i.e., sexually explicit "adult" movies. The Court indicated that the mere fact that material protected by the First Amendment on this subject to zoning requirements is not a sufficient reason for invalidating the ordinance, characterized as an "anti-skid row ordinance". In the case of *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lake-Wood*, 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 1983, the City of Lakewood ordinance prohibiting the building of anything other than a home in the residential district was held to be constitutional even though it prohibited churches, movie theaters, and other First Amendment uses constituting places of public assembly.

The above indicated cases clearly indicate that proper zoning ordinances may exclude or regulate First Amendment rights. In the landmark case of *Village of Euclid v. Ambler Realty, supra*, it is obvious that the Supreme Court upheld zoning classifications that clearly excluded First Amendment uses from single and two-family residential use districts.

In traditional public forums, the state may enforce regulations of the time, place and manner of expression which are *content-neutral,* are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. See *Perry Education Association v. Perry Local Educators Association,* 460 U.S. 37; *United States v. Grace,* ..... U.S. ....., 75 L. Ed. 2d 736 (1983); *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 647-8; *Young v. American Mini Theaters, supra*; *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1975); *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977) citing *Kovacs v. Cooper,* 336 U.S. 77 (1949); *Police Department of Chicago v. Mosley,* 408 U.S. 92, 98, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972); *Grayned v. City of Rockford,* 408 U.S. 104, 115, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972); *Cox v. Louisiana,* 379 U.S. 536, at 554-555, 13 L. Ed. 2d 471; *Poulos v. New Hampshire,* 345 U.S. 395, 398, 97 L. Ed. 1105, 73 S. Ct. 760, 30 A.L.R.2d 987 (1953); *Cox v. New Hampshire,* 312 U.S. 569, 575-576, 85 L. Ed. 1049, 61 S. Ct. 762, 133 A.L.R. 1396 (1941); *Schneider v. State,* 308 U.S. 147, 84 L. Ed. 155, 60 S. Ct. 146 (1939). Indeed, the guarantees of the First Amendment have never meant that people who want to propagandize or protest views have a constitutional right to do so whenever and however and wherever they please. *Greer v. Spock,* 424 U.S. 828, 836 (1976).

The City of Euclid, through §1743.32(h), has permissibly endeavored to place reasonable and necessary regulations on the use of political signs without prohibiting total use of such signs on private resident property.

In the case of *Peltz v. City of South Euclid,* 11 Ohio St. 2d 128 (1967), the Ohio Supreme Court declared that a *city-wide total* ban of the use of political signs is violative of Article I, Section 11 of the Ohio Constitution, and

the First and Fourteenth Amendments to the United States Constitution. See also *Pace v. Village of Walton Hills*, 15 Ohio St. 2d 51 (1968). The Ohio Supreme Court explicitly recognized that a city could regulate the placement of political signs. Other city wide bans of First Amendment activities have also been looked upon with disfavor. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) and *Keego Harbor Company v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981).

In the within case, it is important that the Court note that there is no wholesale city wide ban on political signs. Political signs are permitted and otherwise regulated in the non-residential use districts of the City. It is submitted that this fact alone would be sufficient to totally ban political signs from residential districts. See *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, supra*. However, the City of Euclid has also permitted such signs in residential districts since the *Peltz* and *Walton Hills* cases, *supra*, related to situations involving residential property, notwithstanding a blanket total city wide ban on political signs in those cases. Experience of the city is that the proliferation of political signs during election campaigns has detracted from the tranquil residential environment, contributed to litter and vandalism through discardment, and increased blight from cheaply constructed signs which easily weather. Therefore, the City of Euclid has acted to limit political signs in residential neighborhoods only to window signs by the Section 1743.32(a). The City of Euclid has devised a legitimate means of combating these nuisances while still protecting the right to political expression.

Section 1743.32(h) does not discriminate on the basis of the signs' messages. The restrictions proscribing the size and location of the political signs are designed solely

to the extent that they alleviate the recognized nuisances. The standard of judicial review of legislation restricting speech was set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).

> A government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 377.

The ordinance regulates the location and size of political graphics. It does not deny the respondents their right to express a political preference or to participate in self-government. Further, no other sign message is given greater freedom than political signs. *All* other signs are banned in residentially zoned districts by §1743.24 of the Euclid Codified Ordinances, except "For Sale" or "For Rent" signs which have a separate legal and practical standing as accessory uses. (See 1377.01(c) and 1743.32(a) regulations thereof.)

The City of Euclid as a corporation chartered under the Constitution and laws of the State of Ohio, possesses the power to legislate for itself and its citizens under the "home rule" amendment of the Ohio Constitution, Article XVIII, Section 3. The City has an important and substantial interest in maintaining the safety and environment of its residential communities. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The City of Euclid has absolutely no interest in restricting free speech, political or otherwise, other than what is necessary to achieve its stated goal. By restricting political signs

in residential neighborhoods to specific locations, the City of Euclid has removed the opportunities for vandalism and visual blight while still retaining a citizen's ability to express his political views on his property. Therefore, the ordinance meets the requirements of *O'Brien* and complies with the dictate of *Peltz* and *Walton Hills, supra.*

The Euclid City Council determined some time ago that signs that offer the real estate upon which they sit "For Sale" or "For Rent" are accessory uses to residential property in that they relate solely to the residence itself, unlike any other type of sign, which, though they may express the views of a resident, have no relation to the property. As stated in *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977), there are a few adequate alternate methods to communicate the message of real estate signs as contrasted to political signs:

> Although in theory sellers remain free to employ a number of alternatives, in practice realty is not marketed through leaflets, soundtracks, demonstrations or the like. They are less likely to reach persons not deliberately seeking sales information, are more costly, and may be a less effective media for communicating the message. *Id.* at 93.

Linmark involved Willingboro's attempt to *ban* the use of *not all lawn signs,* just real estate signs, in *residential* areas. The Supreme Court held such legislation to be unconstitutional. Whether a total ban on signs could survive constitutional scrutiny was undecided. (See Footnote 7, *Id.* at 431 U.S. 93.) Unreversed is the total ban of real estate signs upheld in *Barrick Realty v. City of Gary,* 491 F.2d 161 (7th Cir. 1974).

In the case of *Packer Corporation v. Utah,* 285 U.S. 105, 110 (1932), upholding the constitutionality of the stat-

ute prohibiting tobacco advertising on billboards, streetcar signs and placards while permitting it in newspapers and magazines under the Equal Protection Clause of the Fourteenth Amendment, Justice Brandeis observes:

> Billboards, street car signs and placards and such are in a class by themsleves . . . advertisements of this sort are constantly before the eyes of the observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer . . . in the case of newspapers and magazines, there must be some seeking of the one who is to see and read the advertisement. The radio can be turned off, but not so the billboards . . .

In the case of *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1975), the United States Supreme Court held that the city's policy of denying political advertising on its transit vehicles did not violate the right of free speech. The Court ruled that a streetcar is not a public forum in which advertisement of any political or personal view may be forced upon a "captive" audience of commuters, finding that the city consciously limited access to its transit system advertising space to minimize the risk of imposing upon a captive audience.

Recognizing the hazards posed to the safety and environment of the residential districts of the city, the decisions in the *Peltz*, *Walton Hills*, and *Linmark* cases, *supra*, and recognizing the public convenience and principle that the Constitution and laws were created to serve the people and not the other way around, it is apparent that the City Council of Euclid has very carefully and responsibly attempted to balance all interests.

Certainly it is more imperative to protect a residential neighborhood than the interior of a rapid transit car or bus, i.e., the risk of imposing upon a captive audience is far greater in that one has a choice of going or not going on public transportation, but the view of a resident in a single family neighborhood from the windows in his home or while en route thereto, involve absolutely no choice whatsoever on the part of the observer. The Council of the City of Euclid never intended that a public forum be created by permitting certain signs in the context above stated. It is therefore inappropriate for a court to make such a determination and thereby apply a standard which places the city in a position of either banning all signs or permitting all signs without regard to content. If distinctions were allowed in the *Lehman* case, *supra*, respecting public transportation facilities, the distinction without question should apply to residential neighborhoods.

In the case of *Pepper Pike v. Landskroner*, 53 Ohio App. 2d 63, the Court recognized that a municipality could enact an ordinance under its police power for the general welfare of the community or when a certain use became a nuisance or interfered with the character and integrity of the single family residential neighborhood even though the secondary effect of the ordinance was aesthetics. More recently, in *Hudson v. Albrecht, Inc.*, 9 Ohio St. 3d 60 (1984), it was held that there is a legitimate governmental interest in maintaining the aesthetics of a community and, as such, aesthetic considerations may be taken into account by a legislative body in enacting zoning legislation.

The presumption of validity attaches to all ordinances, including zoning ordinances. The legislative enactment will not be disturbed, unless it is shown that the action taken by the municipality in denying a property owner

the unrestricted use of his property is arbitrary, capricious, and there is no reasonable relationship to the health, safety or welfare of the community.

The respondent in the within case failed to meet the burden of proof necessary to overcome this presumption. In *Willott v. Beachwood,* 175 Ohio St. 557 (1964), the "fairly debatable" rule for a trial court's guidance and rendering a determination involving a constitutional question attaches to the validity of a zoning ordinance, to-wit:

> The determination of the question of whether regulations prescribed by a zoning ordinance have a real or substantial relation to the public health, safety, morals or general welfare is committed, in the first instance to the judgment and the discretion of the legislative body . . . the legislative, not the judicial, authority is charged with the duty of determining the wisdom of zoning regulations, and the judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is *fairly debatable.* (emphasis added).
>
> Even though the Court, on the facts presented might decide otherwise than did council, so long as the matter is reasonably debatable, the Court has no authority to interfere. The power of a municipality to establish zones, to classify property, to control traffic and to determine land use policy is a legislative function which will not be interfered with by the Courts, unless such power is exercised in such arbitrary, confiscatory or unreasonable manner as to be in violation of constitutional guarantees.

See also *Village of Euclid v. Ambler Realty, supra,* quoted in the *Willott* case, *supra.* Furthermore, in order to

have ordinal provisions of the type under consideration declared unconstitutional, the complainant must demonstrate that such provisions are clearly erroneous and that the ordinances in question are unreasonable and arbitrary beyond a reasonable doubt. See *Curtis v. City of Cleveland,* 170 Ohio St. 127 (1959); *Alsenas v. Brecksville,* 29 Ohio App. 2d 255 (1972, Cuyahoga County) *cert. denied; Helton v. Toledo,* 62 Ohio St. 2d 394 (1980).

Accordingly, for the reasons stated, §1743.32(h) of the Euclid Codified Ordinances is a valid exercise of a municipality's police power authority and the regulation applicable to private property in residentially zoned districts is certainly necessary and justified, and the decision of the Court of Appeals finding the ordinance unconstitutional should be reversed.

II. A MUNICIPAL CORPORATION THROUGH ITS POLICE POWER MAY REGULATE THE TIME, PLACE AND MANNER OF DISPLAYING POLITICAL SIGNS ON PRIVATE PROPERTY IN A RESIDENTIALLY ZONED USE DISTRICT WITHOUT APPLYING LIKE RESTRICTIONS TO SIGNS OFFERING THE REAL ESTATE PROPERTY UPON WHICH THEY SIT "FOR SALE" OR "FOR RENT" AND WITHOUT VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION OR THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, WHERE THE LATTER SIGNS ARE ACCORDED A DIFFERENT LEGAL AND PRACTICAL STANDING AS ACCESSORY USES ON PRIVATELY OWNED REAL ESTATE IN RESIDENTIAL DISTRICTS, TO PRESERVE PROPERTY VALUE AND WHERE THE ADEQUATE ALTERNATE CHANNELS OF COMMUNICATION FOR POLITICAL MESSAGES ARE FAR GREATER THAN THE LATTER.

It is clear that there are different types of signs to be found in residential use districts, single family and otherwise. The Court may also take judicial notice of some of these. On the public property in residential use districts, there are street identification signs, traffic regulation signs and devices (stop signs, speed limit signs, school zone signs, traffic lights, caution lights, etc.), and address identification on curbing. In the single family use districts involved in the within case, signs often permitted on private property are classified as follows: identification of street number and name of occupant; security related signs usually posted in the windows such as "Beware of dog",

warning of protection by some security agency, block watch, etc.; signs offering real estate upon which they sit for sale or for rent; and political signs. Aside from the political signs involved in the within case, no other signs are permitted in the single family residential use districts of the City of Euclid. All of the aforesaid signs, exclusive of the real estate signs and political signs, have something in common. They provide critical information to persons traveling upon the streets and private property in single family residential use districts and there is no other way, i.e., no other adequate channel of communication, for conveying such information. The signs tell people how fast to go, when to stop, when to go, when to watch out for special dangers, identify streets upon which people wish to travel, identify the houses by number and name of occupant for persons looking for a certain address and occupied by a certain individual, and give warnings to burglars as a means of crime prevention respecting the security type signs. It is certainly facetious to even mention leaflets, soundtracks, demonstrations, newspaper articles, etc., as even being alternate channels of communications for these messages, i.e. they are clearly inadequate.

The City of Euclid's concern in protecting the aesthetic environment of its residential communities is a significant justification for regulating political signs in residential neighborhoods. The United States Supreme Court in its recent decision of *Members of City Council of Los Angeles, et al. v. Taxpayers for Vincent, et al.*, ... U.S. ....., 80 L. Ed. 2d 772 (1984), stated:

> It is well settled that the state may legitimately exercise its police power to advance aesthetic values . . . Therefore, the critical inquiries are whether that interest is sufficiently substantial to justify the effect of the ordinance on appellee's expression, and

whether that effect is no greater than necessary to accomplish the City's purpose.

In *Vincent* the Court held that although governmental property can be used as a vehicle for communication such as sign posts, this does not mean that the Constitution requires such use to be permitted by members of the public and that the City's aesthetic interest in eliminating signs on public property was not compromised by failing to extend the ban to private property. Thus, the signage located on the public streets for the purposes stated had no bearing on the City's right to regulate signage on the adjacent private property in single family residential use districts.

In *Vincent,* the Court upheld the city's ban on all signs posted on public property such as telephone poles and light posts. The principal reason for the legislation advanced by the City was the "visual blight" created by the posting of various signs, to which the Court responded:

> (T)he visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property constitutes a significant substantive evil within the City's power to prohibit.

Likewise, in the present case, the Euclid City Council is concerned with the proliferation of political signs in residential neighborhoods. This is a legitimate and substantial concern of the municipal government, especially, since the tranquility and environment of residential neighborhoods is a primary concern to all citizens. Therefore, in accordance with *Vincent*, it is sufficient to justify regulation of expression which is non-related to residential use.

The Euclid ordinance is the least restrictive means of effecting the City's purpose, while retaining alternative

methods of expression. In upholding the Los Angeles legislation, the Supreme Court in *Vincent* wrote:

> Here, the substantive evil-visual blight is not merely a possible by-product of the activity, but is created by the medium of expression itself. The ordinance curtails no more speech than is necessary to accomplish its purpose.

In deciding that other viable alternatives of expression were preserved, the Court stated:

> The Los Angeles ordinance does not affect any individual's freedom to speak and distribute literature in the same place where the posting of signs on public property is prohibited.

Likewise, the Euclid ordinance merely prohibits political lawn signs, the form of expression which creates the problem. Given the potential for sign displays at each house on a street for one or more candidates at election time compared to the few signs that may be associated with the small percentage of homes for sale at a given time, the differential magnitude of the problem is clearly demonstrated. The ordinance itself provides a viable alternative in window signs. This, coupled with the numerous other channels of political expression otherwise unavailable respecting the sale or rental of residential real estate establishes that §1743.32(h) is the narrowest means of accomplishing the City's purpose and is therefore, a valid exercise of legislative power.

The Fourteenth Amendment to the United States Constitution provides that no person shall be denied the equal protection of the law by the states.

Equal protection necessarily relates to the judging of classifications by law. The Constitution does not require things which are different in fact to be treated in law

as though they were the same. *Tigner v. Texas,* 316 U.S. 141, 147 (1940). The mere fact of classification will not void legislation, because in the exercise of its powers, a legislature has considerable discretion in recognizing the differences between and among persons and situations. See *McGowan v. Maryland,* 366 U.S. 420 (1961); *Schlip v. Kuebel,* 404 U.S. 357 (1971); and *Barrett v. Indiana,* 299 U.S. 26 (1913). Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, it is not within the amendment. See *Barbier v. Connolly,* 113 U.S. 27, 32 (1885). Statutes create many classifications which do not deny equal protection; it is only the invidious discrimination that offends the Constitution. See *Ferguson v. Skrupa,* 372 U.S. 726, 732 (1963); *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489 (1955).

The test for determining the line between permissible and invidious classifications was stated in the case of *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78-79, quoted in full in *Morey v. Doud,* 354 U.S. 457, 463-464 (1957), to-wit:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against the clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

3. When the classification in such a law is called in question, if any statement of facts reasonably can be conceived that would sustain it, the existence of that statement of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

It is of no concern to the Court that the legislative body may have drawn a particular classification which may be less than perfect, *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), or that the classification chosen attacks only one aspect of a particular problem and not another, *Williamson v. Lee Optical Co., supra.*

Here it is submitted that all persons similarly situated are being treated alike. Political signs and real estate "signs" do not have "constitutional rights" and are not entitled to "equal protection". Certainly, all persons living in a single family use district are treated the same with respect to identification, security, real estate and political signs.

The analysis turns not to the property owners wherever situated throughout the city, because property owners in other use districts may be regulated in a variety of ways. It is submitted that the persons who are similarly situated, the owners of the single or two family homes in the U-1 and U-2 use districts are treated the same, i.e., the operation of the regulations affects alike all persons the same. When an owner of property in such a residential use district desires to sell or rent his property, he or she may post a "For Sale" or "For Rent" sign and when such person desires to express his or her political position or

give a political message, they may place two political posters in the windows of their residence. Furthermore, based upon purpose of this signage, relationship to the property upon which it is posted, the accessory nature of the signage to the permitted use under zoning, and the number of alternate adequate channels of communications, it appears clear that it is quite rational and proper under the equal protection clause to classify on the basis of informational and security signs as one classification, real estate signs has another classification, and political and commercial as third and fourth or combined classification. Indeed from the *Vincent* case, *supra,* Syllabus 2(g) it appears clear that there is no constitutional mandate to require permitting political signs as an exception nor is it clear that such an exception is even constitutionally permissible because of the risk of engaging in constitutionally forbidden content discrimination respecting the posting of signs on public property; the same logic should apply to the situation at hand on private property in single family residential use districts.

In *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, a city ordinance was held unconstitutional on its face to the extent that it prohibited on-site non-commercial billboard messages but permitted on-site commercial billboard messages in a commercial use district.

Justice Stevens opined that it seems accepted by all that a zoning regulation excluding billboards from residential neighborhoods is justified by the interest in maintaining pleasant surroundings and enhancing property values. *Id.* 453 U.S. 552. Reducing the number of signs was deemed a legitimate means of furthering the goals of traffic safety and aesthetics by Justices White, Stewart, Marshall and Powell. *Id.* 453 U.S. 511. The Euclid ordinances certainly are in harmony with both of these statements.

To hold that pure content neutrality is axiomatic as applies to signage in single-family residential use districts is not sound policy in logic or law and it is certainly not mandated by the case law. Reduction of the visual clutter caused by signs in residential neighborhoods as much as possible is clearly a legitimate goal for a municipality in keeping with the police power. To hold that the First Amendment mandates allowing all signs or banning all signs means that a person at the extreme must accept viewing political, commercial, and other messages at every turn in the area of his or her home as a condition for posting a simple address or name identification plate; the Constitution, however, was created to be the servant of the people and not the other way around. Content differential regulations have been upheld, e.g., *Young v. American Mini Theaters, supra* (location of adult theaters); *Lehman v. Shaker Heights, supra* (political advertising banned from public transportation); *Packer Corp. v. Utah, supra* (tobacco ads on billboards prohibited); *Barrick Realty v. City of Gary, supra* ("For Sale" signs banned while "For Rent" signs permitted), where the circumstances were held to warrant such. The logic of theses cases applies to the case at hand. Euclid's regulations do limit sign clutter in keeping with the legitimate goals of protecting residential neighborhoods and signs permitted, banned or subjected to differential regulations have been carefully classified with respect to: (1) essential informational needs; (2) relationship to property upon which posted; (3) accessory use relationship to permitted use on property; (4) availiability of adequate alternate channels of communication; and (5) differential problems associated with particular signs at particular sites. The need, justifications, relationship to property, accessory use relationship and lack of associated problems of information, security and real estate signs are common and they meet all

such tests; political signs meet none of these criteria. The alternate channels of communication for each are: none (zero) for informational and security signs; two (2) others for real estate signs; and an almost infinite number for political signs. Only the political signs appear in such numerosity at the Halloween-election season and are the source of police problems when posted in the lawns. Four justices allowed that differential regulations for on-site business (accessory use and related to property use, allowed) and off-site business (non-accessory use or related to property, not allowed) was appropriate in *Metromedia. Id.* 453 U.S. 512. In *Young v. American Mini Theaters, supra,* it was held appropriate to regulate traditional and adult movie theaters differently, because the problems associated with the latter were not associated with the former. As in *Vincent,* the ordinance does not affect any individual's freedom to speak and distribute literature in the same place where the posting of signs is prohibited. Each method of communicating ideas is a law unto itself and the law must reflect the differing nature, values, abuses and damages of each method. A court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest at stake. *Metromedia, Id.* 453 U.S. 501-503.

A careful review of the law and circumstances will reflect that the City of Euclid has a right to ban all real estate or political signs or both from the lawns of single-family neighborhoods and to regulate the placement of such signs the same or differentially as determined by the council, because it is certainly debatable as to how best to achieve the legitimate goals of the City, the circumstances under which the Courts give deference to the legislature.

For the reasons stated, these important concerns necessitate the type of legislative action undertaken by the

City of Euclid through the passage and implementation of §1743.32(h).

The decision of the Court of Appeals should be reversed and this Court should hold the ordinances in question to be proper enactments not in violation of the U.S. or Ohio Constitutions.

CONCLUSION

The within case is of great importance with respect to constitutional law issues and issues of great public interest. First Amendment free speech is a paramount right that is at the heart of our American democracy. However, certain regulations of expression are necessary to an orderly society, and such regulations are permitted where they are incident to an important and significant governmental purpose. In the landmark case of *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Supreme Court recognized that the police power is not limited to the elimination of filth and stench and that municipalities have the right to establish residential areas as "sanctuaries for people", e.g., free from commercial type signs and atmosphere. The City of Euclid has recognized a substantial threat to this "sanctuary" and has enacted legislation to alleviate the problem while imposing the least restrictive infringement on free political speech.

Municipalities in Ohio are faced with uncertain decisions regarding their powers to regulate signs. *Linmark, supra,* appears to disallow a ban on real estate signs. *Peltz, supra,* is cited as authority to allow regulation but not absolute prohibition of political signs. *Albrecht, supra,* deems aesthetics—a significant consideration in zoning regulation. Other decisions seem to hold that permitting one type of sign on residential property somehow invokes the "public forum" concept requiring "content neutral" regulation, i.e., mandates where a sign is permitted for any

purpose, any other sign anyone may desire for any purpose must also be allowed, defeating the *Belle Terre* purpose. (See e.g., *Meros v. Euclid, et al.*, U.S. District Court Case No. C83-4353, August 15, 1984, U.S. District Court, Northern District of Ohio and *City of Cleveland v. Walters*, Case No. 39302, Court of Appeals, Eighth Ohio District, February 15, 1979.)

In *Members of City Council v. Taxpayers for Vincent* (1984), ... U.S. ....., 104 S. Ct. 2118, at Syllabus 2(g), the Court stated that there is no constitutional mandate for a political sign exception, nor is it clear that such an exception would be constitutionally permissible because the creation of such an exception might create a risk of constitutionally forbidden content discrimination. This holding is *in obvious conflict* with the *Peltz* case, *supra*, and the United States Supreme Court should resolve this conflict. Notwithstanding the evidence available as to the infinitely greater number of adequate alternate channels of communication for political signs compared to real estate signs and other distinctions, e.g., numerosity at a given time, relationship to property as accessory use, problems due to season of placement, etc., the Court of Appeals made no analysis of competing interest taking these factors into account as mandated by *Linmark*, *supra*, 431 U.S. 85, 91, and *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 503.

The City of Euclid has enacted legislation which recognizes and balances each of these interests in a comprehensive and well-reasoned plan. Other communities have banned all signs to avoid commercialism in residential districts. The undersigned respectfully urge this Court to utilize this opportunity to clarify the framework in which municipal legislatures are guided in the exercise of the police power authority and duty to maintain residential areas as "sanctuaries for people" in the regulation of First Amendment expression, in balancing and taking

into account whether or not the purpose of signage is accessory or not, and in determining the existence of adequate alternate channels of communication for each purpose. Giving municipalities the guidelines needed here for certainty in planning and legislation will also serve to avoid litigation of numerous other cases from other cities analyzing the constitutionality of their ordinances in the legal setting above stated.

In addition thereto, there has been significant federal civil litigation in the matter of *John Jordan, et al. v. Patrick R. Rocco, et al.*, filed in the Northern District of Ohio (1985), see Appendix page A46, wherein the respondents herein have sued the City of Euclid and its appointed officials for Two Million Dollars. Obviously, these circumstances have a "chilling" effect upon the wholesome resolve of city officials to preserve the character of residential neighborhoods with reasonable and practical regulations. It is a matter of great public interest that these issues be heard and resolved by the Supreme Court of the United States in order to once and for all bring finality and certainty to these paramount and controversial issues threatening the authority of municipalities throughout the land.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL

(Dated March 20, 1985)

Case Nos. 84-1836, 84-1837, 84-1838, 84-1839, 84-1840, 84-1841, 84-1842

THE SUPREME COURT OF OHIO
COLUMBUS

CITY OF EUCLID,
Appellant,
v.
GRACE MABEL *et al.*,
Appellees.

JUDGMENT ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

/s/ FRANK D. CELEBREZZE
Chief Justice

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

(Dated September 27, 1984)

COURT OF APPEALS OF OHIO
EIGHTH JUDICIAL DISTRICT OF OHIO,
COUNTY OF CUYAHOGA

CITY OF EUCLID,
Plaintiff-Appellee,

VS.

GRACE MABEL (47856)
VICTORIA CICEK (47857)
CASIMIR CHOROMANSKI (47858)
JEANE ZUPANIC (47859)
CARMEN TARANTINO (47860)
PHYLLIS JORDAN (47861)
JIM FRATCHER (47862),
Defendants-Appellants.

NAHRA, *J.*:

Grace Mabel, Victoria Cicek, Casimir Choromanski, Jeane Zupanic, Carmen Tarantino, Phyllis Jordan and Jim Fratcher, appellants, were convicted of violating City of Euclid Ordinance § 1743.32(h),[1] which prohibits political

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1. The challenged ordinance provides that:

> Political graphics shall be permitted for a period of not more than seventeen days before and five days after an election, with the size of the graphics not to exceed two square feet in area per graphic and such graphics to be located within an occupied residence as window graphics not to exceed two political graphics per residence.

Codified Ordinance Euclid § 1743.32(h) (1982).

lawn signs on residential property. Appellant Jim Fratcher had political advertising attached to the outside of his front storm door, and the remaining appellants had signs on their front lawns which advertised the election of a political candidate. After the trial court denied appellants' motions to dismiss, thus upholding the validity of the ordinance, appellants pled no contest. The trial court found appellants guilty, fined each appellant ten dollars, and placed all of them on probation. Appellants timely appealed.

I.

Appellants' first two assignments of error are that:

I. The trial court erred in overruling appellants' motion to dismiss the charges against appellants in that the ordinance upon which the City of Euclid's criminal prosecution was brought is a denial of appellants' rights to the freedom of speech secured by the First Amendment to the Constitution of the United States, and Section 11, Article I, of the Constitution of Ohio.

II. The trial court erred in overruling appellants' motion to dismiss the charges against the appellants in that the ordinance upon which the City of Euclid's criminal prosecution was brought is a denial of appellants' rights to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

These two assignments of error will be discussed together since appellants' equal protection argument, discrimination based upon content, lends itself to traditional freedom of speech analyses.

Section 1743.32(h) of the Codified Ordinances of the City of Euclid provides that:

> Political graphics shall be permitted for a period of not more than seventeen days before and five days after an election, with the size of the graphics not to exceed two square feet in area per graphic and such graphics to be located within an occupied residence as window graphics not to exceed two political graphics per residence.

Appellants contend that this ordinance denies free speech since it discriminates on the basis of content. The City argues that the ordinance is content neutral, that it represents a reasonable time, place or manner regulation, and that it serves compelling government interests.

The challenged ordinance has been declared unconstitutional under the federal constitution in *Meros v. City of Euclid*, No. C83-4353 (N.D. Ohio Aug. 17, 1984) and we reach the same conclusion here under the Ohio Constitution as well.

The United States Supreme Court has recently addressed similar challenges under the First Amendment[2] utilizing two different approaches. In some cases, the Court has applied a test to determine whether an ordinance is unconstitutional on its face. *See, e.g., Members of City Council v. Taxpayers for Vincent* (1984), 104 S. Ct. 2118. In other cases, the Court has applied a balancing test to determine whether the government has a compelling interest which overrides the First Amendment rights of the private party. *See, e.g., Consolidated Edison v. Public Service Commission* (1980), 447 U.S. 530. We will apply both tests in our review of Euclid's ordinance.

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2. The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

The First Amendment to the United States Constitution and Article I, Section 11[3] of the Ohio Constitution protect the exercise of free expression. Freedom of speech, however, is not absolute, and several categories of expression have been exempted from First Amendment protection. *E.g., Miller v. California* (1973), 413 U.S. 15 (obscenity); *Bradenburg v.* Ohio (1969), 395 U.S. 444 (speech inciting immediate unlawful action); *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568 (fighting words). Political speech, unlike the unprotected categories of expression, is at the core of the First Amendment and is therefore "entitled to the fullest possible measure of constitutional protection . . . ." *Members of City Council v. Taxpayers for Vincent* (1984), 104 S. Ct. 2118, 2135.

A. Facial Analysis

An ordinance may be declared invalid on its face if it is unconstitutional in every conceivable application. *Taxpayers,* 104 S. Ct. at 2124. It is well-established that generally the government cannot restrict expression on the basis of its subject matter.[4] *See, e.g., Police Department v. Mosley* (1972), 408 U.S. 92, 95. "To allow a government the choice of permissible subjects for public debate would be to allow that government control over

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3. Article I, Section 11 provides, in relevant part, that "[e]very citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech; or of the press." Ohio Const. Art. I, § 11.

4. Only in two narrowly-drawn exceptions were government regulations based on content upheld. In *Greer v. Spock* (1976), 424 U.S. 828, and *Lehman v. Shaker Heights* (1974), 418 U.S. 298, private parties asserted a right of access to public facilities. These cases were subsequently distinguished and held inapplicable to challenges by a private party seeking to use his own property to express his views rather than seeking access to public facilities. *See Consolidated Edison v. Public Service Commission* (1980), 447 U.S. 530.

the search for political truth." *Consolidated Edison v. Public Service Commission* (1980), 447 U.S. 530, 538. As a result, a City may not select a particular type of speech for differential treatment. *Metromedia, Inc. v. San Diego* (1981), 453 U.S. 490, 514.

In this case, the City has singled out and prohibited lawn signs on residential property which carry political messages. Real estate lawn signs and other commercial lawn signs are permitted. The City has thereby impermissibly decided which viewpoints may and may not be conveyed through this medium of communication. This is exactly the type of content discrimination prohibited by the First Amendment, *see Metromedia*, 453 U.S. 490; *Carey v. Brown* (1980), 447 U.S. 455; *Norton Outdoor Advertising v. Arlington Heights* (1982), 69 Ohio St. 2d 539, and prohibited by Article I, Section 11 of the Ohio Constitution.

The City argues, however, that the ordinance is content-neutral since it does not discriminate against any one particular political view in favor of another. The United States Supreme Court specifically rejected an analogous concept of neutrality in *Consolidated Edison*. In that case, the Public Service Commission argued that because its prohibition against the discussion of nuclear power, both pro and con, in utility bill inserts was related to the broad subject matter rather than to the views of a particular speaker, its ban should be upheld. In rejecting this argument, the Supreme Court stated that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison*, 447 U.S. at 537; *see also Metromedia*, 453 U.S. at 518. We similarly reject this argument.

The City further contends that its ordinance is a reasonable time, place or manner restriction because it merely regulates the size and location of political signs by permitting two political messages in residential windows. There is no question that reasonable time, place or manner regulations may be imposed upon the various methods of speech to prevent the frustration of legitimate government goals. *See, e.g., Heffron v. Int'l Soc. for Krishna Consc.* (1981), 452 U.S. 640. However, these regulations must apply to all speech irrespective of content. *Erznoznik v. Jacksonville* (1975), 422 U.S. 205, 209. Therefore, in order to withstand a constitutional challenge, "time, place, or manner restriction[s] may not be based upon either the content or subject matter of speech." *Consolidated Edison,* 447 U.S. at 536. Because the City's ordinance regulates on the basis of subject matter, *i.e.*, only political graphics are so regulated, the ordinance cannot be upheld as a content-neutral reasonable time, place or manner regulation.

We hold, therefore, that Euclid Ordinance § 1743.32 (h) is invalid on its face. The ordinance impermissibly discriminates on the basis of content in violation of the First Amendment to the United States Constitution, *Meros v. City of Euclid,* No. C83-4353 (N.D. Ohio Aug. 17, 1984), and Article I, Section 11 of the Ohio Constitution and is therefor unconstitutional in every conceivable application.

B. Competing Interests Analysis

An ordinance which restricts the speech of a private individual "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling [government] interest." *Consolidated Edison,* 447 U.S. at 540. The City contends that

its ordinance prevents a public nuisance, avoids and prevents local crime, preserves safe highways, and preserves the aesthetics of the community. The trial court, in its opinion upholding the City's ordinance, stated that:

> automobiles have been driven up across sidewalks over lawns to strike down political graphics emplanted in front lawns that political graphics have been thrown through windows, that they have been torn down by vandals, thrown out into the streets where the political graphics are run over by automobiles causing damage to persons and property. The police are constantly called during the political season when such graphics are posted in front lawns as result of political graphics being vandalized.

Trial Op. at 2.

We conclude that none of the government interests advanced are compelling in order to suppress the political speech of individuals through the use of lawn signs on their own property. Lawn signs as a medium of communication are unique. The United States Court of Appeals for the Ninth Circuit, in striking down an ordinance which, among other things, banned temporary signs from residential areas, stated that:

> the First Amendment interests involved in the display of political posters adjacent to public thoroughfares are substantial. Moreover, means of political communication are not entirely fungible; political posters have unique advantages. Their use may be localized to a degree that radio and newspaper advertising may not. With exception of handbills, they are the least expensive means by which a candidate may achieve name recognition among voters in a local election.

Baldwin v. Redwood City (9th Cir. 1976), 540 F.2d 1360, 1368 (footnote omitted). Similarly, the United States District Court for the Northern District of California expounded on the importance of political signs by stating that:

> The temporary political sign offers special advantages to the candidate seeking public office and to the advocate promoting a particular position on a state ballot measure. These signs are a relatively inexpensive means of campaigning. Their use can be localized so that certain areas which the advocate wishes especially to reach may be targeted. A candidate or partisan can use the temporary sign to place a name or an issue before the public. In a campaign for political office, political posters can be effectively utilized to build up the candidate's name recognition and to establish him as a serious contender. The temporary political sign has special value to the non-incumbent or relatively unknown candidate who can use the signs to identify his name among the electorate. The less well-known candidate can test the waters to see whether his candidacy is viable before going to more expensive media such as television or radio.

City of Antioch v. Candidates' Outdoor Graphic Serv. (N.D. Cal. 1982), 557 F. Supp. 52, 59. We agree with the federal courts and recognize the importance of political signs as a medium of communication.

In *Peltz v. South Euclid* (1967), 11 Ohio St. 2d 128, the City banned all political signs except bumper stickers. The Supreme Court of Ohio declared the ordinance unconstitutional. *See also Pace v. Walton Hills* (1968), 15 Ohio St. 2d 51. With regard to aesthetics, the Court stated that:

> The ordinance in question sweeps away the right of a property owner to express his opinion on his own property. Defendant's interest in aesthetics does not reasonably outweigh the loss of plaintiff's liberty of speech.

Peltz, 11 Ohio St. 2d at 133; *see also Baldwin*, 540 F.2d at 1370 (less restrictive means available); *Antioch*, 557 F. Supp. at 59; *State v. Miller* (1980), 83 N.J. 402; *City of Cleveland v. Walters*, No. 39302 (8th Dist. Ct. App. Feb. 15, 1979); *but cf. Members of City Council v. Taxpayers for Vincent* (1984), 104 S. Ct. 2118 (city may prohibit the posting of political signs on public property for aesthetic reasons).

The Supreme Court of Ohio went on to say in *Peltz* with respect to traffic that:

> The ordinance is not saved by its purpose to eliminate traffic hazards on main thoroughfares and at street intersections. The proscription is against *all* political signs, irrespective of location. Even the regulation of traffic may not be attempted by means which invade explicit constitutional liberties. *Natl. Assn. for Advancement of Colored People v. Alabama*, 377 U.S. 288, 12 L.Ed. 2d 325, 84 S. Ct. 1302. There is nothing in this record to convince us that a political sign is a greater traffic hazard than all the other features of the landscape which, purposely or not, tempt the attention of drivers. Furthermore, it is difficult to conceive that a political sign, reasonable in size, structure and appearance, would constitute a hazard greater than "bumper stickers" which are expressly permitted by another ordinance of South Euclid, and which, by definition, are not restricted to a specific locality.

Peltz, 11 Ohio St. 2d at 133-134.

Nor can the City justify its ordinance suppressing free speech on private property by stating that political lawn signs on residential property create public nuisances or attract vandals. It is within the power of the City to enact legislation regarding the maintenance of political lawn signs, the removal of obsolete signs, and the defacing or vandalizing of political lawn signs. *See Peltz*, 11 Ohio St. 2d at 133. The City has enacted similar ordinances with respect to commercial signs. *See, e.g.*, Codified Ord. Euclid § 1743.17.

For all of these reasons, we conclude that the City has failed to demonstrate interests which override the private individual's right to free political expression through the use of lawn signs on his own property. Therefore, under both tests set forth by the United States Supreme Court and the tests of Ohio, we find the City's ordinance invalid. Appellants' first two assignments of error are sustained.

II.

Appellants' third assignment of error is that:

III. The trial court erred in taking judicial notice of facts which should have been proven to the trier of fact.

The trial court in its opinion denying appellants' motions to dismiss stated that:

> From the arguments brought before this court, from prior cases brought before this court involving political graphics and from personal experience, the Court takes notice that automobiles have been driven up across sidewalks over lawns to strike down political graphics emplated in front lawns, that political graphics have been thrown through windows, that

> they have been torn down by vandals, thrown out into the streets where the political graphics are run over by automobiles causing damage to persons and property. The police are constantly called during the political season when such graphics are posted in front lawns as a result of political graphics being vandalized.

Trial Op. at 2. Appellants contend that these facts are not of the type that are judicially noticeable and that these facts were judicially noticed without informing appellants.

The record indicates that at the hearing on their motion, appellants, through their counsel, admitted that lawn signs are vandalized and cause litter. Tr. 5-6. These facts are therefore undisputed, and the trial court may properly take judicial notice of undisputed facts. *See Brown v. Cleveland* (1981), 66 Ohio St. 2d 93, 98. In addition, the record is void of any request by appellants for an opportunity to be heard as to the propriety of the court's action pursuant to Ohio R. Evid. 201(E). Consequently, this assignment of error is overruled.

III.

Appellants' last assignment of error is that:

> IV. The trial court erred by considering as evidence the affidavits submitted by the city prosecutor, thereby denying appellants their rights to confront the witnesses against them secured by the sixth amendment to the constitution of the United States.

The criminal rules of procedure permit affidavits to be attached to motions. Ohio R. Crim. P. 47. In fairness, the responding party is also permitted to attach affidavits to his brief in opposition. No confrontation rights are

denied by this rule in this situation. Therefore, the trial court did not err in considering the affidavits attached to the City's brief in opposition to appellants' motions to dismiss. Accordingly, this assignment of error is overruled.

The judgment of the trial court is reversed, and this cause is remanded for proceedings consistent with this opinion.

This cause is *reversed and remanded to the Euclid Municipal Court for further proceedings consistent with this opinion.*

It is, therefore, considered that said appellant(s) recover of said appellee(s) *their* costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PARRINO, *P.J.*
RUSSO, *J.*, Concur.

/s/ JOSEPH J. NAHRA,
Judge

JOURNAL ENTRIES OF EUCLID MUNICIPAL COURT

(Dated November 25, 1983)

CITY OF EUCLID,
Plaintiff,

vs.

GRACE MABEL (83-CR-B-971),*
V. T. CICEK (83-CR-B-969),
CASIMER CHOROMANSKI (83-CR-B-964),
JEANE ZUPANIC (83-CR-B-960),
CARMEN TARANTINO (83-CR-B-959),
JAMES R. FRATCHER (83-CR-B-954),
PHYLLIS JORDAN (83-CR-B-947),
Defendants.

This matter came on for consideration by the Court upon defendant's Motion to Dismiss, upon Briefs, Memorandum, Affidavits and an oral hearing.

The Court recognizes the principle that the power to regulate is not the power to destroy. The Ordinance in question herein (Euclid Codified Ordinance 1743.32(h)) reads as follows:

> "(h) Political graphics shall be permitted for a period of not more than seventeen (17) days before and five (5) days after an election, with the size of said graphics not to exceed two square feet in area per graphic and said graphics to be located within an occupied residence as window graphics not to exceed two political graphics per residence."

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*A separate and identical Journal Entry was filed in the Euclid Municipal Court in each numbered case respective to the defendants named therein.

which ordinance regulates the placement of political graphics, but neither destroys the right to, or prohibits, the placement of political graphics.

While the law considers all persons to be equal and entitled to equal protection, yet the law permits reasonable classifications. The Classification established by this ordinance is Political Graphics. There is a sound basis for this classification. A political graphic is a temporary sign constructed to last for only a short period of time, is usually constructed of light duty wood and cardboard, is held together with nails and the sign affixed with staples or tacks. In addition, political graphics appear to raise emotions within the community for people to react favorable, unfavorably and on occasion violently.

From the arguments brought before this court, from prior cases brought before this court involving political graphics and from personal experience, the Court takes notice that automobiles have been driven up across sidewalks over lawns to strike down political graphics emplanted in front lawns, that political graphics have been thrown through windows, that they have been torn down by vandals, thrown out into the streets where the political graphics are run over by automobiles causing damage to persons and property. The police are constantly called during the political season when such graphics are posted in front lawns as a result of political graphics being vandalized.

The Court well recognizes and supports First Amendment rights of free speech. However, in this case the Court finds that the regulations imposed by Euclid Codified Ordinance 1743.32(h), as aforerecited, is only regulatory and does not prohibit any right of free speech. This is especially true in light of the overriding public interest for the safety, health and welfare of the citizens of this

community. As such, the police power to regulate is an overriding authority and must prevail. Any citizen is still free to express themself freely via political graphics inside front windows or doors which in Euclid on an average is approximately fifteen (15) to thirty (30) feet from the sidewalk.

One further argument made by defendant has to do with real estate signs and signs in school yards. These are not political graphics. They are solidly constructed of metal or heavy duty wood, do not raise emotional issues and to date have not caused any problems with public safety. In addition, schools are the property of separate governmental entities, schools occupy the status of nonconforming uses, they are not residences, they are used as schools, not homes. As such real estate signs and signs in front of schools do not fall within the reasonable classification established by the political graphics ordinance.

This fall's political season is now over. This now is the time and opportunity for all persons who are truly interested in the well being of the community to bury the hatchet and work in harmony as they choose for a better city. While a prima facie technical violation of the ordinance appears to have occurred which leaves the court with no alternative other than to overrule the defendant's motion to dismiss.

Defendant's attorney has advised the court of his intention to withdraw defendant's not guilty plea, enter a no contest plea to the original charge, in which case justice will be done by the court with sentence, if any, fully mitigated.

Wherefore, defendant's motion to dismiss is not well taken and for the reasoning hereinbefore stated said motion is hereby overruled.

/s/ ROBERT S. NICCUM
Judge

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT IN THOMAS L. MEROS v. CITY OF EUCLID ET AL.

Case No. C83-4353

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS L. MEROS,
Plaintiff,

vs.

CITY OF EUCLID, OHIO, THE COUNCIL FOR THE CITY OF EUCLID, OHIO, ANTHONY J. GIUNTA, etc., DAVID LOMBARDO, etc., PATRICK ROCCO, etc., MICHAEL KOSMETOS, WILLIAM DEMORA, MARK JOCHUM, GEORGE CARSON, NICK MARINO, TED THEODORE, DONALD MALONE, JOSEPH FARRELL, ED SUSTARSIC, etc.,
Defendants.

JUDGMENT ENTRY

This matter came on for trial to the Court on February 23, 1984. At the close of plaintiff's case-in-chief, the Court dismissed the following defendants from the action: Council for City of Euclid, Mayor Anthony Giunta, David Lombardo, Patrick Rocco, Michael Kosmetos, William DeMora, Mark Jochum, George Carson, Nick Marino, Ted Theodore, Donald Malone, Joseph Farrell, and Ed Sustarsic. The City of Euclid remained as the only defendant.

The Court filed its Memorandum of Opinion and Order finding that the City of Euclid violated 42 U.S.C. § 1983 by infringing upon plaintiff's First Amendment free speech rights. The Court declared City of Euclid Ordinance 75-1982 to be unconstitutional on its face to the extent that it prohibits political lawn signs in residential areas while § 1743.32(a) permits "For Rent" and "For Sale" signs in the same areas. The Court further enjoined the City of Euclid from enforcing Ordinance 75-1982. Therefore,

IT IS ORDERED that judgment is entered in favor of plaintiff and against defendant City of Euclid. Defendant City of Euclid to pay all costs.

IT IS SO ORDERED.

/s/ ALVIN J. KRENZLER
United States District Judge

MEMORANDUM OF OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT IN THOMAS L. MEROS v. CITY OF EUCLID ET AL.

Case No. C83-4353

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS L. MEROS,
Plaintiff,

vs.

CITY OF EUCLID, OHIO, THE COUNCIL FOR THE CITY OF EUCLID, OHIO, ANTHONY J. GIUNTA, etc., DAVID LOMBARDO, etc., PATRICK ROCCO, etc., MICHAEL KOSMETOS, WILLIAM DEMORA, MARK JOCHUM, GEORGE CARSON, NICK MARINO, TED THEODORE, DONALD MALONE, JOSEPH FARRELL, ED SUSTARSIC, etc.,
Defendants.

MEMORANDUM OF OPINION AND ORDER

Plaintiff commenced this action on October 26, 1984, alleging violations of 42 U.S.C. § 1983 for infringement of his First Amendment rights. Plaintiff seeks in part a declaratory judgment pursuant to 28 U.S.C. § 2201 that City of Euclid Ordinance 75-1982 unconstitutionally deprives him of freedom of speech, as well as an order enjoining defendant from enforcing said ordinance. Ordinance 75-1982 prohibits the display of political lawn signs within the city but allows political window graphics within an occupied residence. Defendants filed an amended joint answer on November 28, 1983.

The Court maintains jurisdiction in this action under 42 U.S.C. §§ 1331 and 1343(3).

Plaintiff filed a motion for a temporary restraining order in this action on October 26, 1984. On October 27, 1984, the Court overruled the motion for a temporary restraining order. The case was tried by the Court without a jury on February 23, 1984. At the close of plaintiff's case-in-chief, the Court dismissed the following defendants from the action: Council for City of Euclid, Mayor Anthony Giunta, David Lombardo, Patrick Rocco, Michael Kosmetos, William DeMora, Mark Jochum, George Carson, Nick Marino, Ted Theodore, Donald Malone, Joseph Farrell, and Ed Sustarsic. The City of Euclid remained as the only defendant.

The Court, based on the testimony and documentary evidence presented at trial, makes the following findings of fact and conclusions of law.

In October, 1983, plaintiff, a candidate for political office in the election to be held on November 8, 1983, constructed political lawn signs designed to advance his candidacy. Plaintiff and several of his supporters placed these signs in the front yards of their homes. Prior to the election, employees of the City of Euclid removed the signs from the properties of several of plaintiff's supporters, pursuant to Ordinance 75-1982 which does not permit political lawn signs in residential areas within the city. Plaintiff was advised that the signs were in violation of the Ordinance.

The statutory scheme regulating the placement of signs in residential districts in the City of Euclid is as follows.

Pursuant to zoning ordinance § 1377.01 of the Codified Ordinances of the City of Euclid, Ohio, signboards or advertising signs are prohibited in residential areas with

the exception of "For Rent" or "For Sale" signs as an accessory use to the residence.[1]

Chapter 1743 of the Codified Ordinances, entitled "Street Graphics," regulates the construction and placement of signs where permitted by zoning. In particular, Section 1743.24 of this Chapter prohibits wall, roof, projecting or pole-mounted graphics in any residential zoning district.[2]

Exemptions to the total prohibition in § 1743.24 are set forth in § 1743.32 which provides that the regulations of Chapter 1743 do not apply to certain graphics. Section 1743.32(a) permits nonilluminated real estate advertising graphics to be displayed in residential areas. The signs may not exceed five square feet in area and must advertise the sale, rental, lease or management of the premises on which the graphic is located.

Section 1743.32(h) exempts political graphics which comport with the regulations of that section from the total prohibition against graphics. Ordinance 75-1982, adopted April 5, 1982, amended § 1743.32(h) to permit political graphics in residential areas only to the extent of window graphics within an occupied residence. Section 1743.32(h), as amended, provides that:

> (h) Political graphics shall be permitted for a period of not more than (17) days before and five (5) days

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1. Section 1377.01(c) provides that:

A billboard, signboard or advertising sign shall in no case be permitted as an accessory use. The placing of a "For Sale" or "For Rent" sign shall however be permitted as an accessory use.

2. Section 1743.24 provides that:

No wall graphic, roof graphic, projecting graphic or pole-mounted graphic shall be permitted in any residential zoning district as delineated on the present or any hereafter adopted official zoning map.

after an election, with the size of said graphics not to exceed two square feet in area per graphic and said graphics to be located within an occupied residence as window graphics not to exceed two political graphics per residence.

Defendant presented evidence at trial that political lawn signs pose traffic safety and aesthetic problems which Ordinance 75-1982 was intended to alleviate.

Plaintiff brought this action pursuant to 42 U.S.C. § 1983. Under § 1983, plaintiff may only recover for violations of his constitutional rights committed by persons acting under color of state law. *Gomez v. Toledo,* 446 U.S. 635, 640 (1980). Defendant City of Euclid acted under color of state law in enacting and enforcing Ordinance 75-1982, which by implication prohibits political lawn graphics. The issue before the Court, therefore, is whether the ordinance prohibiting political lawn signs abridges plaintiff's freedom of speech within the meaning of the First Amendment.

Ordinance 75-1982 prohibits plaintiff from communicating political messages in residential areas in a certain manner, i.e., by means of lawn graphics, but permits such messages in the form of indoor window graphics of a certain size. The Ordinance therefore curtails political speech to a certain extent in residential areas. However, not all curtailments of speech constitute a violation of First Amendment rights, for the state may limit speech when necessary to advance a significant and legitimate state interest. *Schenck v. United States,* 249 U.S. 47, 52 (1919).

The degree of limitation on speech permitted under the First Amendment varies depending on what the laws curtailing speech are actually regulating. Laws regulating

the time, place or manner of speech which are neutral to the speaker's point of view are permissible if the incidental restrictions on the alleged First Amendment freedoms are no greater than is essential to further a substantial governmental interest. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977); *City Council v. Taxpayers for Vincent*, ... U.S. ....., 80 L. Ed. 2d 772, 787, 104 S. Ct. ..... (1984).

The standards for reviewing time, place, and manner restrictions are irrelevant in the instant action, however, because the City of Euclid Ordinance 75-1982 is not neutral to the speaker's point of view. The city has prohibited the placement of political lawn signs in residential areas, contending that such regulation is necessary to alleviate aesthetic and safety problems. Nevertheless, the city permits "For Sale" and "For Rent" lawn signs in the same residential areas with the only restriction being that the signs not exceed five square feet. Furthermore, the evidence at trial indicated that a substantial number of these "For Sale" and "For Rent" signs are displayed within the city at any given time.

The city, by banning political lawn signs but allowing "For Sale" and "For Rent" lawn graphics, indicates a conclusion on its part that the communication of commercial information concerning the sale or rental of a residence is of greater value than homeowners' or renters' rights to express political beliefs on their lawns. The Court concludes, therefore, that Ordinance 75-1982 displays a non-neutral position to the type of speech permitted on the lawns of the city's residential areas.

As stated in the recent Supreme Court case of *City Council v. Taxpayers for Vincent*, *Id.* at 786, the general rule has emerged that the First Amendment forbids the

government from regulating speech in ways that favor some viewpoints over others. Furthermore, the First Amendment permits the regulation of commercial speech to a greater degree than noncommercial ideological speech. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981).

Based on these rules, the plurality of the Court in *Metromedia* held that a San Diego city ordinance was unconstitutional on its face to the extent that it prohibited on-site noncommercial billboard messages but permitted on-site commercial billboard messages. The Court reasoned that a city cannot, through its ordinances accord commercial speech a greater degree of protection than noncommercial speech at the same location.

In the instant action, the city has failed to explain how or why political lawn signs in residential areas are more threatening to safe driving or detract more from the beauty of the city than "For Sale" or "For Rent" signs in the same area.

The city offered evidence at trial that residents of the city display more political lawn signs at election time than they display "For Sale" or "For Rent" signs. The evidence at trial, however, indicated that a substantial number of "For Sale" or "For Rent" lawn signs are posted in residential areas of the city at any given time. The city also presented evidence that the "For Sale" and "For Rent" signs are constructed of sturdier materials which better withstand weather conditions and therefore present less of a safety hazard.

However, the evidence offered as to the quantity or quality of political signs displayed is irrelevant in this action because Ordinance 75-1982 bans all political lawn

signs regardless of construction, while § 1743.32(a) places no number or construction limitations on the permitted "For Sale" or "For Rent" signs.

The Court therefore finds that City of Euclid Ordinance 75-1982 which prohibits political lawn signs in residential areas while § 1743.32(a) permits "For Sale" and "For Rent" lawn signs, reaches too far into the realm of speech protected by the First Amendment by distinguishing and preferring commercial speech. Thus, the Court concludes that the City of Euclid violated 42 U.S.C. § 1983 by infringing upon plaintiff's First Amendment free speech rights.

Accordingly, the Court declares the City of Euclid Ordinance 75-1982 to be unconstitutional on its face to the extent that it prohibits political lawn signs in residential areas, while § 1743.32(a) permits lawn signs which carry the message that a residence is "For Sale" or "For Rent," in the same areas. The Court further enjoins the City of Euclid from enforcing Ordinance 75-1982.

The City is not, however, left defenseless regarding the safety and aesthetic concerns it has raised relating to lawn signs. The city remains free to place reasonable limitations on the time, size, and construction standards for lawn signs within its residential areas. The city could limit the size of lawn sizes. Since lawn signs serve different functions, the city is free to limit the use of the lawn signs to the time framework within which the lawn signs serve their function. The city could restrain lawn signs promoting political candidates to a reasonable period surrounding the election in question. The time framework for "For Sale" and "For Rent" signs could be limited to the period in which the residences are actually for sale or for rent. The city is also free to adopt reasonable

construction standards for lawn signs in order that the signs withstand weathering.

In conclusion, the Court does not hold here that the city may not regulate political lawn signs. The Court merely finds the City of Euclid Ordinance to be unconstitutional on its face to the extent that it prohibits political lawn signs in residential areas which § 1743.32(a) of the Euclid Codified Ordinances permits commercial "For Sale" or "For Rent" signs in the same areas.

IT IS SO ORDERED.

/s/ ALVIN J. KRENZLER
United States District Judge

JOURNAL ENTRY AND OPINION OF THE CUYAHOGA COUNTY COURT OF APPEALS IN CITY OF CLEVELAND v. ARISTOTLE WALTERS

Dated February 15, 1979

No. 39302

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

CITY OF CLEVELAND
Plaintiff-Appellee

VS.

ARISTOTLE WALTERS
Defendant-Appellant

Appeal From
Cleveland Municipal Court
No. 77 CVH 7281
JOURNAL ENTRY AND OPINION

PRYATEL, J.

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Cleveland Municipal Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Cleveland Municipal Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

Appellant Aristotle Walters appeals the judgment of the Cleveland Municipal Court granting appellee City of Cleveland's prayer for injunctive relief ordering appellant to remove signs posted on his property.[1] Appellant's motion for a stay of proceedings pending appeal was granted on April 26, 1978.

Appellant resides at 3268 East 139th Street in Cleveland, Ohio. In January, 1977 the Mayor's office received complaints from the Mount Pleasant Community and the East 139th Street Club concerning appellant's display of certain religious and political slogans written on numerous signs covering the front of his house. (Tr. 8). In short, neighbors were complaining about the eyesore.[2] City Housing Department officials, William Halligan and Douglas Glass testified that appellant had been cited for violating City Ordinance Nos. 337.03 and 337.23 and had been notified to remove his signs. (Tr. 14-16). Halligan admitted that the dimensions of no sign had been measured (the ordinance specifies permissible dimensions of signs), but he further stated that all of the signs covered the front of the house. (Tr. 32, 36).[3] In addition to the testi-

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1. Appeal #38288 was brought from criminal case #77-CRB 4729; Appeal #39302 is brought from civil case #77-CVH 7281. For purposes of appeal these two cases were consolidated by this court on July 25, 1978, since they share the same facts. (Journal Entry, July 25, 1978).

The criminal appeal has been dismissed for lack of a final order of the Cleveland Municipal Court.

2. John Armstrong, a former city councilman and neighbor, said he had "never seen so many signs on a privately owned house . . . ." (Tr. 49). Another neighbor, Miss Iona Davis, complained of the increase in traffic caused by curious passersby (Tr. 71-74), as well as the unsightliness of appellant's house situated directly across the street from her own home.

3. William Halligan, a city housing inspector of some 20 years who is also an experienced bricklayer (Tr. 17, 35), further

(Continued on following page)

mony of the two neighbors who had complained about the signs (Note 2, *supra*), several photographs showing the signs attached to the appellant's home were admitted into evidence (Tr. 22, 43) (although the photos were not made a part of the record on appeal). There was no direct testimony about the exact zoning classification of the district in which appellant resided (Tr. 17); however, testimony generally indicated the neighborhood to be residential.[4]

Appellant presents the following assignments of error:

Footnote continued—

estimated the height of the house to be twenty to twenty-five feet and the width to be approximately eighteen feet. (Tr. 36). Ordinance No. 337.23(8) and (9) requires signs posting an address or place of business to be two square feet in area, or less, and signs for advertising or public announcements to be twelve square feet in area, or less.

4. Cleveland Ordinance Nos. 335.01 and 335.02 delimit fifteen use districts of which the following six districts are the most restrictive "residence districts": "Limited One-Family Districts;" "One-Family District;" "Two-Family Districts;" "Limited Multi-Family Districts;" "Multi-Family Districts;" "Residence-Office Districts." Appellee failed to establish specifically which of these districts appellant resides in. Mr. Armstrong testified that the area "is about 60-some per cent home ownership," (Tr. 46), and that it is "residential." (Tr. 50). Mr. Halligan testified as follows:

> "The zoning is a one-family A-1. —no, I'm sorry. It is a multi-family; I believe I'd have to check my records on that. (Tr. 17)."

Mrs. Iona Davis was asked on direct examination about the neighborhood:

> "Q. It is residential or are stores there or what kind?
>
> "A. It is residential." (Tr. 64).

I. THE TRIAL COURT ERRED IN RELYING UPON §337.23(a) OF THE ZONING CODE OF THE CITY OF CLEVELAND AND ORDERING THE APPELLANT'S SIGNS REMOVED, BECAUSE THE ORDINANCE IN QUESTION IS PERMISSIVE RATHER THAN PROHIBITIVE.

Cleveland Ordinance No. 337.23(a) regulates "permitted accessory uses" in residential districts. Subsections (8) and (9) provide the basis of appellee's actions filed against appellant, and are set forth as follows:

"(8) Signs for the following purposes not exceeding two square feet in area and illuminated only by the reflector method, placed back of the building line, and so erected that the light source is not visible from outside the premises:

"A. In Limited One-Family Districts, and in One-Family Districts, a sign bearing only the house number and the name of the occupant.

"B. In other Residence Districts, a sign bearing the house number and the name of the occupant or building, or indicating existence of an enterprise permitted on the premises.

"(9) Signs for the following purposes not exceeding twelve square feet in area and illuminated only by the reflector method, placed back of the building line, and so erected that the light source is not visible from outside the premises:

"A. A sign advertising only the sale, rental or lease of the building or premises on which it is maintained.

"B. An announcement sign or bulletin board for the use of a public, charitable or religious institution occupying the premises.

"C. An advertising sign in connection with a lawfully maintained nonconforming use."

Appellant contends that the ordinance section is permissive, and not prohibitive. An ordinance specifically limiting a zoning classification to certain uses by implication prohibits all others. *Williams v. Bloomington* (1969), 108 Ill. App. 2d 307. Also, the New Jersey Supreme Court has held that a zoning ordinance that lists the permitted uses in a residential area prohibits all other uses. *State v. Farmland-Fairlawn Dairies* (1961), 70 N. J. Super. 19.

Accordingly, appellant's first assignment of error is overruled.

II. THE ORDINANCE UPON WHICH THE CITY'S SUIT IS BASED IS UNCONSTITUTIONAL AS AN INFRINGEMENT UPON APPELLANT'S RIGHTS UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 11 OF THE OHIO CONSTITUTION.[5]

Appellant contends that the selective prohibition of signs as accessory uses in zoned districts is a violation of equal protection of the laws by denying appellant his right to exercise free speech, since the city ordinance sections regulate the content of signs posted by appellant on his own property.

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5. This assignment of error incorporates the issues raised in appellant's two assignments of error presented in his appeal of the criminal case decided against him:

"1. A municipality may not regulate the content of signs.

"2. The right to enact reasonable zoning or other regulations does not grant to the City of Cleveland the right to deny expression protected by the First Amendment." (Appeal #38288).

The leading cases in Ohio hold that absolute prohibition of political signs in residential districts is unconstitutional. *Pace v. Walton Hills, et al.* (1968), 15 Ohio St. 2d 51;[6] *Peltz v. South Euclid* (1967), 11 Ohio St. 2d 129.

In *Peltz, supra,* the City of South Euclid, Ohio, had enacted an ordinance designed expressly to eliminate political signs, the ordinance having the desired goal of abating "a potential traffic hazard and the unsightliness resulting from the widespread use of these signs." (At 130). The Supreme Court of Ohio applied a balancing test set forth in *Curtiss v. Cleveland* (1959), 170 Ohio St. 127:

> ". . . the benefit to the public health, safety, morals or general welfare from zoning use limitations must be sufficient to *reasonably outweigh the loss* to the landowner in order to justify zoning legislation causing such loss by limiting such owner's right to use his property." (emphasis supplied). *Peltz, supra,* at 132.

The court concluded that the city's interest in public welfare did not reasonably outweigh the right of a property owner to express his opinion on his own property and thus ruled the ordinance unconstitutional by its "wholesale prohibition" of political posters. (At 133).

In *Pace v. Walton Hills, supra* (which relied upon the reasoning in *Peltz, supra*), unlike the South Euclid

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6. Walton Hills Ordinance 1951-3, 4-1(d), discussed in *Pace, supra,* and submitted as Appendix B of appellant's brief on appeal, is set forth below:

> "The following signs are permitted; real estate signs, residential professional office signs; roadside stand signs; all such signs to be nonilluminated. Home occupation, roadside stand and professional signs shall not be over two (2) square feet in area. Real estate signs, shall be permitted only to advertise the sale, rental, or lease of the premises on which they are maintained, shall be not over twelve (12) square feet in area, may be maintained on the premises of schools or churches or other permitted public buildings."

ordinance, the Walton Hills ordinance did not expressly attack political posters, but instead permitted only certain signs to be displayed on private property. (See Note 6, *supra*). Nonetheless, the court ruled *Per Curiam* that the ordinance acted as an unconstitutional denial of freedom of speech by its "absolute prohibition of the use of political signs."

The Walton Hills ordinance and the Cleveland Ordinance No. 337.23, at issue in this case, are very similar. Both restrict the size and type of sign one is permitted to post in a residential district.

Subsequent to the *Peltz* and *Pace* decisions, however, the U.S. Supreme Court affirmed a decision of the Ohio Supreme Court, holding that a city's policy of denying political advertising on its transit vehicles did not violate the right of free speech. *Lehman v. City of Shaker Heights* (1974), 418 U.S. 298, 41 L. Ed. 2d 770, 94 S. Ct. 2714.[7]

The Court ruled that a streetcar is not a forum in which advertisement of any political or personal view may be forced upon a "captive" audience of commuters:

> "No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation." *Lehman, supra* at 778.

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7. The Ohio citation is as follows:

Lehman v. Shaker Heights (1973), 34 Ohio St. 2d 143.

Although appellee cites *Lehman* as supporting its argument that the Cleveland ordinance reasonably restricts people such as appellant from diminishing "the residential quality" of a neighborhood, the decision cannot be applied to the facts of this case.

Lehman deals with "commercial speech," an exception carved out of the greater concept of freedom of speech, to which the Court has traditionally applied less stringent standards of scrutiny than in those cases where "pure" speech is at issue.

Moreover, in two recent decisions the Court has questioned the propriety of commercial speech exceptions by expressing its dissatisfaction with simply labeling certain speech "commercial" without first assessing its values through the regular balancing tests applied in other "speech" cases. *Bigelow v. Virginia* (1975), 421 U.S. 809, 44 L. Ed. 2d 600, 95 S. Ct. 2222; *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (1976), 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817. In *Virginia Pharmacy*, the Court concluded that commercial speech is not wholly outside the protection of the First Amendment and that it is always necessary to look to the subject matter of the speech in question, to determine whether its regulation is permissible. Whatever merit lay within the *Lehman* rationale has thus since been eroded to some extent. Therefore, we must closely scrutinize the fact that the Cleveland ordinance determines the content of signs, as did the unconstitutional Walton Hills ordinance, to determine if it is nonetheless a permissible regulation.

Other U.S. Supreme Court decisions have ruled city ordinances to be unconstitutional where their effect is to regulate the content of speech. *Linmark Associates, Inc. v. Willingsboro* (1977), 431 U.S. 85, 52 L. Ed. 2d 155, 97

S. Ct. 1614, in which a city ordinance prohibited the posting of "for sale" signs on real estate; *Erznoznik v. City of Jacksonville* (1975), 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268, in which an ordinance outlawed all films containing nudity from being shown at drive-ins; *Grayned v. City of Rockford* (1972), 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294, in which an ordinance made an impermissible distinction between labor picketing and other peaceful picketing, allowing the former but not the latter.

In *Linmark* the Court rejected the argument that "alternative channels of communication" were feasibly open to the appellant, because they involved more cost and less autonomy for the individual than simply posting a "for sale" sign on his own property. (At 162). The Court also cited *Kovacs v. Cooper* (1949), 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448, which held that "laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether,"[8] (at 162) and held the absolute prohibition in the Willingsboro ordinance to be unconstitutional. In dicta, however, the Court echoed *Erznoznik v. Jacksonville, supra,* by indicating that an ordinance may be permissible where it serves "to restrict a mode of communication that 'intrudes on the privacy of the home, . . . [and] makes it impractical for the viewer or auditor to avoid exposure.' "[9] (At 162.)

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8. The rule is reiterated in *Erznoznik v. Jacksonville, supra*:

"Although each case ultimately must depend on its own specific facts, some general principles have emerged. A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. See Kovacs v. Cooper, supra; Cox v. Louisiana, 379 US 536, 554, 13 L Ed 2d 471, 85 S Ct 453 (1965); Adderley v. Florida, 385 US 39, 17 L Ed 2d 149, 87 S Ct 242 (1966)." (At 130).

9. *Erznoznik, supra* at 132.

In *Erznoznik* the Court struck down the prohibitive ordinance, which imposed too broad a censorship, and added that those who did not wish to view the "offensive" images projected on the drive-in movie screen were free simply to avert their gaze, because they were not subjcted to unavoidable exposure.

Appellee cites these two recent decisions to support the reasonability of the Cleveland ordinance which, through its enforcement, protects the interests of those individuals who are not free to "avoid exposure" from garish signs which intrude on the privacy of their homes. Appellee argues that salutory effects of the ordinance outweigh appellant's right to utilize his own property as he sees fit to express his personal beliefs.

We do not agree. Here we are not passing on the number of signs or slogans but on the fact that only certain signs are permitted, while others are not.

Whatever one's personal predilections may be, despite one's own aesthetic values in assessing that which constitutes good or bad, we must be alert to guard against encroaching upon that very right of expression which the constitution secures for us. It is difficult in a case such as this to weigh objectively the competing, diverse interests between those who wish to enjoy their property, free from unwanted visual obstructions of their neighbors, and one who wishes to express his feelings in a controversial fashion on his own property. There is little question that the Cleveland ordinance was written with the well-intentioned purpose of keeping residential areas reasonably presentable by limiting the size and wording as well as number of advertising signs that clutter up our modern, commercial society.

Nonetheless, the decisions of both the Ohio and United States Supreme Courts clearly prohibit such ordinances that prohibit free speech through their regulation of the content of protected speech.

In light of the broad restriction of the Cleveland ordinance, we hold it to be unconstitutional in its present form as an infringement of appellant's right to exercise his freedom of speech.

Appellant's second assignment of error is sustained.

III. THE JUDGMENT BELOW MUST BE REVERSED BECAUSE THE PLAINTIFF FAILED TO ESTABLISH ALL ELEMENTS OF ITS CAUSE OF ACTION.

Appellant argues that the City's failure to produce testimony about the dimensions of the signs and the zoning classification of the area in which he resides obviates appellee's cause of action, since the elements of such claim were not established.

Although appellee did not present the specific information about which appellant complains, we believe that the court, as finder of fact, had adequate factual information from which to render its decision on the principles involved here. A court of review will not overrule findings of a trial court unless it appears that evidence was insufficient to enable reasonable minds to render the judgment entered. *Preston v. Bricker* (1959), 85 Ohio Law Abs. 329; *State, ex rel., Squire v. Cleveland* (1948), 150 Ohio St. 469.

Accordingly, appellant's third assignment of error is overruled.

In view of our holding as to appellant's second assignment of error, the decision of the trial court is reversed and final judgment is entered for the appellant.

It is, therefore, considered that said appellant(x) recover of said appellee(x) his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

KRUPANSKY, J., Concurs.
JACKSON, P.J., Not Participating.

/s/ AUGUST PRYATEL
Judge

JOURNAL ENTRY AND OPINION OF EAST CLEVELAND MUNICIPAL COURT IN CITY OF EAST CLEVELAND v. LOUIS B. BURROUGHS

(Filed September 28, 1978)

Case Nos. 78 CR B 695/1 and 696/1

IN THE EAST CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

CITY OF EAST CLEVELAND,
Plaintiff,

vs.

LOUIS B. BURROUGHS,
Defendant.

JOURNAL ENTRY AND OPINION

This matter arose out of the alleged violation of Section 1125.05 of Ordinance No. 6878 of the City of East Cleveland by the defendant Louis B. Burroughs in two separate instances, to-wit: On April 13, 1978 at 15108 Terrace Road and on June 8, 1978 at 14504 Scioto Avenue in East Cleveland, Ohio. The first violation is the subject matter of Case Number 78 CR B 695/1 and the second of Case Number 78 CR B 696/1 of the records and dockets of this Court.

On July 25, 1978 the defendant filed a motion to dismiss each charge on the ground that the ordinance was unconstitutional because it violated the First Amendment to the United States Constitution and Article I, Section 11 of the Ohio State Constitution. A hearing on said motions was scheduled for August 24, 1978 at which time the defendant formally entered a plea of not guilty to each

charge. By stipulation of counsel, a combined evidentiary hearing and trial was forthwith held and the Court reserved ruling on the constitutional question.

The First Amendment to the Constitution of the United States of America provides, in pertinent part, as follows:

> "Congress shall make no law . . . abridging the freedom of speech, . . .", and

Article I, Section 11 of the Constitution of the State of Ohio reads, in relevant part, as follows:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, . . ."

While the defendant did not specifically argue, in his brief or otherwise, that the Ordinance in question also violates the due process clause of the Fourteenth Amendment, such argument is necessarily implied, since freedom of speech is among the personal rights and liberties which are protected by the due process clause of the Fourteenth Amendment from invasion by state or local governmental action. *American Cancer Soc., Inc. v. City of Dayton*, 160 Ohio St. 114, 51 O.O. 32 (1953). *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900 (1940).

The section of the Codified Ordinances of the City of East Cleveland in question reads, as follows:

> "1125.05 SIGNS
>
> Except as specifically hereafter permitted, *no* billboard, signboard, advertising sign, *for sale sign* or other sign *shall be permitted in a Class U1* or *U2 District*.
>
> *The following signs are permitted*: bulletin boards aggregating not over twelve square feet in area for

schools or churches; a sign not over two feet square in area containing the name or address of an occupant of the premises, or both the name and address; a sign not over twelve square feet in area on the site of a building under construction, but only while such building is under construction, bearing the name of any contractor or contractors in such construction; one for rent or vacancy sign not more than one square foot in area; not more than two political signs or posters, each having an area of not more than two square feet, as window signs within an occupied residence; *for informational purposes only, one 'for sale' sign or poster having an area of not more than two square feet including in uniform sized letters and numbers only the words 'FOR SALE, BY OWNER (or Broker's Name),' and the telephone number of the owner or broker to be contacted may be placed as a window sign within a residence on each side of a residential structure fronting on a public street* or one such sign may be posted on a lot having no dwelling structure thereon facing the public street at the setback line in effect for such lot." (italicizing added)

Section 1123.01 of said City's Ordinances defines in subsection (a) thereof a Class U1 District, to-wit:

"Class U1 Residence Uses: Single-family dwelling; double house; two-family dwelling."

The City of East Cleveland has the manifest power to enact a comprehensive zoning ordinance and has done so. The landmark case in America recognizing the right and power of a municipality to do so is *Euclid v. Ambler*, 272 U.S. 365, 47 S. Ct. 114 (1926). So, too, the power of the City to regulate the mode and placement of advertising signs is beyond doubt. *Criterion Service, Inc. v. City of*

East Cleveland, 55 Ohio L. Abs 90, 88 N.E.2d 300 (1949). See also, 82 *Am. Jur.* 2d, Zoning and Planning, § 124, p. 594, where it is stated:

> "Municipal corporations, under the police power, may regulate all types of outdoor advertising, being limited only by state and federal constitutional provisions and by a requirement that the regulations be not unreasonable, in the sense that they must bear a substantial relation to the maintenance of safety, health, security, peace, morals, general welfare, etc., . . . In this respect, *zoning* prohibitions or *regulations with regard to* billboards or outdoor *advertising signs have been upheld as applied to such signs or billboards in residential districts,* 'for rent' or 'for sale' signs by real estate brokers with their names, addresses and telephone numbers, . . ." (italicizing added)

In this case the evidence, including exhibits, stipulations, admissions and defendant's testimony, discloses that each sign was two feet by two and one-half feet; that each sign was suspended from a cross of wood approximately six feet high located in the front yard of the residences; and that each sign contained in uniform lettering for each subject displayed thereon, the following legends or matter in descending order: (1) For Sale, (2) the logo of the franchise for Realty World, (3) Burroughs Real Estate Co.—the name under which the defendant did business as a franchise holder from Realty World, and (4) the telephone number: 663-2700.

The defendant offered testimony, individually and through witnesses, that homes in East Cleveland were sold in substantial amounts prior to October 18, 1977 when no "for sale" sign of any nature was permitted and thereafter when "for sale" signs were authorized within the limita-

tions set forth in the ordinance in question; that other media of communication, e.g., word of mouth, newspaper advertising, listing with real estate agents and through the mutliple listing services of real estate agents, to effect sales of homes were utilized, both before and after such date; that "for sale" signs are prevalent in some other communities, have high impact and are regarded as a primary tool in the sales of homes; that the restriction on the use of authorized "for sale" signs under the City's ordinance results in "low visibility"; and that the placement of a "for sale" sign in the front lawn does not constitute a traffic hazard.

The City offered evidence that window signs of two square feet were visible from the street; that at least one real estate broker in the City had never used "for sale" signs to effectuate sales; that such signs would or could constitute traffic hazards; and that the purpose of the City Commissioners in adopting the ordinance in question was to preserve the public peace, property, health and safety in residential districts, to maintain the property values thereof and to insure a non-commercial atmosphere therein.

Judicial notice was taken by the Court of the relevant and applicable ordinances of the City of East Cleveland, including particularly Section 1103.01 of the Codified Ordinances which is found in the zoning portion thereof and which states the purpose for the City's adoption of the zoning ordinances. This section, reads, as follows:

> "The City of East Cleveland is hereby districted or zoned to promote the public health, safety, convenience, comfort, morals, prosperity and general welfare, including the promotion of home ownership, the protection of residence sections, the prevention of conges-

tion, the increasing of trade and industrial efficiency, the conservation of property values, the assurance of adequate light and air and the limitation, control and regulation of buildings in the City in accordance with a well established plan of use, height, size and area for all property and its development in the City."

In oral argument and briefs the defendant placed great stress upon the case of *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 97 S. Ct. 1614 (1977). There is, however, a marked distinction between the facts of the *Willingboro* case and this one. In the *Willingboro* case the Township of Willingboro, New Jersey to prevent what is now commonly referred to as "block busting" adopted a total ban of all "For Sale" signs on real estate in the township. However, here the parties admit that "block busting" is not involved and that "For Sale" signs are not totally banned. They are, in point of fact, only regulated as to size, content and placement in residential areas. This distinction is highlighted by the following excerpt from pages 94 and 95 of the *Willingboro* opinion where the United States Supreme Court said:

"Second, *the Willingboro ordinance is not genuinely concerned with the place of speech*—front lawns—or *the manner of the speech*—signs. *The township has not prohibited all lawn signs*—or all lawn signs of a particular shape or size—*in order to promote aesthetic values or any other value 'unrelated to the suppression of free expression,' . . . Nor has it acted to restrict a mode of communication that 'intrudes on the privacy of the home, . . . makes it impractical for the unwilling viewer or auditor to avoid exposure,' . . . or otherwise reaches a group the township has a right to protect.*" (italicizing added)

Under the *Willingboro* case both the owner of property and his real estate agent may advertise and promote the sale of residential property through the use of "For Sale" signs, whether said signs be regarded as "commercial" or "non-commercial" speech. Such right, however, must be balanced against the right of a municipality under its police power to reasonably prescribe the mode and manner thereof. This principle is noted by the United States Supreme Court in the *Willingboro* case where at page 93 of its reporter Justice Thurgood Marshall said:

> *". . . laws regulating the time, place or manner of speech stand on a different footing from laws prohibiting speech altogether."* (italicizing added)

Although this Court feels that a "For Sale" sign in a window is not as an effective sales device as that of a lawn sign and is less viisble, it does not feel that it should intrude upon the legislative function and decision of City government. So, too, with respect to the limited mode or manner of authorized concepts or wording that may be placed upon a "For Sale" sign. The presence of a "For Sale" sign in a front or tree lawn patently is distracting and a potential traffic hazard. Similarly, with reference to the dangers inherent to lawful users of real estate from a defectively located or manufactured sign. Again, there is a growing recognition of the "right in the public to be left alone" and not be confronted with such signs as an "unwilling viewer or auditor". All these considerations and the desire to preserve the general welfare of the public and the residents in a strictly residential area were presumptively considered by the City Commission in the adoption of this ordinance.

Recognizing that, as stated in *Alsenas v. City of Brecksville,* 29 Ohio App. (2d) 255, 58 O.O. (2d) 455 (1972),

there is a presumption of legality in all duly enacted ordinances and that to prevail the defendant must clearly establish that the within ordinance does not bear a real and substantial relation to the public health, safety, morals or general welfare and is unreasonable or arbitrary, this Court finds that the defendant has failed to meet his burden of proof on the constitutional question; that, viewed in the sum totality of all surrounding circumstances and the evidence, the ordinance is a legitimate and constitutional exercise of the City of East Cleveland's police power as it relates to zoning; and that, consequently, the defendant's motion to dismiss each complaint must be and is hereby overruled.

/s/ JAMES M. DEVINNE
Judge

COMPLAINT FILED IN UNITED STATES DISTRICT COURT IN JOHN W. JORDAN, ET AL. v. PATRICK R. ROCCO, ET AL.

(Filed April 22,1985)

Case No. C85-1174

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN W. JORDAN,
and
PHYLIS JORDAN,
and
VICTORIA T. CICEK,
and

CARMEN TARANTINO,
and
JOSEPHINE R. TARANTINO,
and
CASIMIR J. CHOROMANSKI,
and
BEATRICE A. CHOROMANSKI,
and
JAMES A. CHOROMANSKI,
and
DAVID R. FRATCHER,
and
MARY FRATCHER,
and
JAMES FRATCHER,
and
MARY ANN FRATCHER,
and
THOMAS L. MEROS,
Plaintiffs

VS.

PATRICK R. ROCCO,
and
WILLIAM CARNEY,
and
WILLIAM F. KAPEL,
and
CITY OF EUCLID, OHIO
Defendants.

COMPLAINT

(Jury Demand Endorsed Hereon)

I. THE PARTIES

1. Plaintiff John W. Jordan is a resident at 385 East 250*th* Street in the City of Euclid, County of Cuyahoga, State of Ohio. At all times material hereto he is the President of the Euclid Democratic Club.

2. Plaintiff Phylis Jordan is a resident of the City of Euclid, and the wife of John W. Jordan.

3. Plaintiff Victoria Cicek is a resident of the City of Euclid, residing 374 East 222*nd* Street.

4. Carmen Tarantino is a resident of the City of Euclid, residing at 374 East 222*nd* Street.

5. Josephine R. Tarantino is a resident of the City of Euclid and is the wife of Carmen Tarantino.

6. Casimir J. Choromanski is a resident of the City of Euclid, residing at 604 East 222*nd* Street.

7. Beatrice A. Choromanski is a resident of the City of Euclid, and is the wife of Casimir Choromanski.

8. James A. Choromanski is a resident of the City of Euclid, and is the son of Casimir and Beatrice Choromanski.

9. David R. Fratcher, at all times material hereto, was a resident of the City of Euclid.

10. Mary Fratcher, at all times material hereto, was a resident of the City of Euclid.

11. James Fratcher, at all times material hereto, was a resident of the City of Euclid, and the son of David R. and Mary Fratcher.

12. Mary Ann Fratcher, at all times material hereto, was a resident of the City of Euclid, and the son of David R. and Mary Fratcher.

13. Thomas L. Meros is a resident of the City of Euclid, and at all times material hereto was a candidate for election to Euclid City Council in November, 1983.

14. Defendant Patrick R. Rocco, at all times material hereto, is the Law Director of the City of Euclid.

15. Defendant William Carney, at all times material hereto is the Building Commissioner of the City of Euclid.

16. Defendant William F. Kadel is at all times material hereto a Housing Inspector in the City of Euclid.

17. Defendant City of Euclid is a municipal corporation organized under the laws of the State of Ohio.

II. JURISDICTION AND VENUE

18. This is a civil rights action, arising under 42 U.S.C. §1983. Plaintiffs seek redress for the deprivation under color of law, of rights, privileges and immunities secured to Plaintiffs by the Constitution and laws of the United States, including, without limitation, rights secured to Plaintiffs by the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

19. Defendants have deprived Plaintiffs of their rights to free expression, freedom from unreasonable search and seizure, right to due process, and the equal protection of the law.

20. Plaintiff invokes the jurisdiction of this Court pursuant to 28 U.S.C. §§1331, 1343(3), 1343(4). There exists between the parties an actual controversy which is justiciable in nature.

21. All parties to this action reside, and the actions and occurrences complained of herein occurred, and the claims alleged herein arose, within the Northern District of Ohio. Therefore, venue of this Court is invoked pursuant to 28 U.S.C. §1391.

III. CLAIMS FOR RELIEF
COUNT ONE

22. Defendant City of Euclid enacted a certain Ordinance No. 75-1982 which became effective as an emergency measure necessary for the preservation of the public peace, safety and welfare of said ordinance prohibited the placement of signs containing a political message in any location on the exterior of the premises of a residence within the City of Euclid.

23. The subject ordinance was found to violate the Constitution of the United States by the United States District Court for the Northern District of Ohio, Eastern Division, Judge Krenzler, Case No. C83-4353 in *Thomas L. Meros vs. City of Euclid, et al,* on August 15, 1984.

24. The subject ordinance was found to violate the Constitution of the State of Ohio by the Ohio Court of Appeals for the Eighth Judicial District, Cuyahoga County, in *City of Euclid vs. Grace Mabel, et al,* Cases Nos. 47856-47862 *Certiorari* denied Cases Nos. 84-1836-1842.

25. On or about October 25, 1983, Plaintiff Thomas L. Meros erected political lawn signs on the residential premises of Plaintiffs Jordan, Cicek, Tarantino, Choromanski, among others.

26. On or about October 24, 1983, Plaintiffs Fratcher secured to the exterior of their front storm door a sign carrying a political message promoting the candidacy of Donald Malaga, a candidate for Euclid City Council.

27. On October 26, 1983, Defendants Rocco, Carney and Kapel, under color of law, maliciously and intentionally acted to violate the civil rights of Plaintiffs. Defendant Kapel, escorted by a Euclid policeman and driven in a Euclid Police cruiser, entered upon the residential premises of each Plaintiff, photographed the premises, seized and removed property without a search warrant. Said Defendant also removed Plaintiffs Phylis Jordan, Victoria Cicek, Carmen Tarantino, Casimir Choromanski and James Fratcher from their respective houses to the police cruiser and issued each with a criminal citation.

28. The Defendants further caused the Plaintiffs to be found guilty of a crime in Euclid Municipal Court and caused their names to be published in the local newspapers. Said Plaintiffs were subject to ridicule, embarrassment, humiliation, and held out to the public as criminals.

29. As a direct and proximate result of Defendants' outrageous conduct all Plaintiffs have suffered emotional distress, incurred the cost of attorney fees, and were deprived of the priceless right to the freedom of speech.

COUNT TWO

30. Plaintiff Thomas L. Meros incorporates by reference the allegations contained in paragraphs One through Twenty-Nine of the Complaint.

31. Plaintiff Thomas L. Meros further states that all Defendants intentionally and maliciously acted under color of law, to deprive Plaintiff of his priceless right to the freedom of speech, and the right to express his candidacy of public office.

32. As a direct and proximate result of Defendants' actions, Plaintiff has suffered damage.

WHEREFORE, Plaintiffs collectively request judgment against all Defendants, jointly and severally, in the amount of ONE MILLION DOLLARS ($1,000,000.00) in compensatory damages, in the amount of ONE MILLION DOLLARS ($1,000,000.00) as punitive damages, costs of this action, attorney fees pursuant to 42 U.S.C. §1988, and other such relief as may be just and proper.

/s/ FORD L. NOBLE
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(216) 694-3930
Attorney for Plaintiffs

JURY DEMAND

The Plaintiffs in the within matter respectfully request a trial by jury.

/s/ FORD L. NOBLE
Attorney for Plaintiffs

UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

(Effective 1791)

Ohio Constitution Comparison

Ohio Const. art. I, § 20.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE VI

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. § 1257(3)

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, c. 646 § 1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat. 590.)

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

RS. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights; attorneys' fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held,

so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.

OHIO CONSTITUTION

ARTICLE I

§ 7 [Rights of conscience; education; necessity of religion and knowledge.]

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general as-

sembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction. (See Const 1802, Art VIII, §§ 3, 25.)

§ 11 [Freedom of speech and of the press; libel.]

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted. (See Const 1802, Art VIII, § 6.)

§ 20 Powers reserved to the people.

This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people. (See Const 1802, Art VIII, § 28).

ARTICLE XVIII

§ 3 [Powers.]

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. (Adopted September 3, 1912.)

EUCLID CODIFIED ORDINANCES

§1377.01(c):

A billboard, signboard or advertising sign shall in no case be permitted as an accessory use. The placing of a "For Sale" or "For Rent" sign shall however be permitted as an accessory use. (Euclid, Ohio, Codified Ordinances, §1377.01(c) [1976].)

§1743.24:

No wall graphic, roof graphic, projecting graphic or pole-mounted graphic shall be permitted in any residential zoning district. . .

§1743.32(a):

The provisions and regulations of this chapter shall not apply to the following graphics. However, such graphics shall be subject to the provisions of Section 1743.17.

(a) A nonilluminated real estate graphic advertising residential property not exceeding five square feet in area which advertises the sale, rental, lease or management of the premises on which the graphic is located. In the case of subdivisions, in place of a graphic for each lot, a nonilluminated graphic or graphics aggregating not more than four square feet per lot, with a total area of all graphics not exceeding 100 square feet. The advertisement displayed on any sign offering for sale a vacant parcel of land in the City including, but not limited to, a "for sale" or "will build to suit" sign, shall include in lettering the size of which makes the wording legible from the street, an indication of the permissible use of the property under

the zoning laws of the City for the use districts in the following terms:

U-1 Single-Family Residence

U-2 Two-Family Residence

U-3 Multi-Family Residence

U-3E High Rise Apartment

U-3EL Elderly High Rise

U-4 Commercial

U-5 Light Industry

U-6 Heavy Industry

U-8 Office

R-Institutional

A nonilluminated real estate graphic advertising multi-family housing or nonresidential property not exceeding twenty-four square feet in area.

(Ord. 139-1978. Passed 6-5-78.)

§1743.32(h):

Political graphics shall be permitted for a period of not more than seventeen (17) days before and five (5) days after an election with the size of said graphics not to exceed two square feet in an area per graphic and said graphics to be located within an occupied residence as window graphics not to exceed two political graphics per residence.

§1743.01:

The purpose of this chapter is to create the legal framework for a comprehensive but balanced system of street graphics, and thereby to facilitate an easy and pleasant communication between people and their

environment. With this purpose in mind, it is the intention of this chapter to authorize the use of graphics which are:

(a) Compatible with their surroundings;

(b) Appropriate to the type activity to which they pertain;

(c) Expressive of the identity of individual proprietors or of the community as a whole; and

(d) Legible in the circumstances in which they are seen.

Office-Supreme Court, U.S.
FILED
JUL 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1985

In The

Supreme Court of the United States

CITY OF EUCLID, OHIO,

Petitioner,

vs.

GRACE MABEL, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether City of Euclid Ordinance No. 75-1982, codified as § 1743.32(h) of the Codified Ordinances of the City of Euclid, violates Respondents' rights to the Freedom of Speech guaranteed by the First Amendment to the Constitution of the United States, and § 11, Article I of the Constitution of Ohio.

II. Whether City of Euclid Ordinance No. 75-1982, codified as § 1743.32(h) of the Codified Ordinances of the City of Euclid, violates the Respondents' rights to the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

PARTIES BELOW

The Respondents are seven defendants, residents of the City of Euclid, Ohio, who were criminally prosecuted for violating City of Euclid Ordinance No. 75-1982, codified as § 1743.32(h) of the Codified Ordinances of the City of Euclid. Their names are Grace Mabel, V.T. Cicek, Casimir Choromanski, Jeane Zupanic, Carmen Tarantino, Phyllis Jordan and James Fratcher.

In the appeal to the Ohio Supreme Court, the following cases were consolidated: Case No. 84-1836, City of Euclid vs. Grace Mable; Case No. 84-1837, City of Euclid vs. V.T. Cicek; Case No. 84-1838, City of Euclid vs. Choromanski; Case No. 84-1839, City of Euclid vs. Zupanic; Case No. 84-1840, City of Euclid vs. Tarantino; Case No. 84-1841, City of Euclid vs. Jordan; and Case No. 84-1842, City of Euclid vs. Fratcher.

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STATEMENT OF THE CASE

This case arises from the criminal prosecution of seven (7) Euclid residents: Grace Mable, V. T. Cicek, Casimir Choromanski, Jeane Zupanic, Carmen Tarantino, Phyllis Jordan and James Fratcher. These residents were found guilty for violating City of Euclid Ordinance 75-1982, codified as § 1743.32(h) of the City, which prohibits the placement of political lawn signs in residential areas.

On November 11, 1983, the seven residents were arraigned in Euclid Municipal Court, whereupon all entered pleas of not guilty.

On November 25, 1983, all seven residents were found guilty in a trial to the Euclid Municipal Court.

Upon appeal to the Eighth Judicial District of the Court of Appeals of the State of Ohio it was held that the subject ordinance was unconstitutional, the decision was journalized on September 27, 1984.

On March 20, 1985, the Supreme Court of the State of Ohio, upon considering the Motion by the City of Euclid for an Order directing the Court of Appeals for Eighth Judicial District to certify its record and the claimed appeal as of right from that Court, said order was overruled and the appeal was dismissed for the reason that there existed no substantial constitutional question therein.

REASONS FOR DENYING THE WRIT

A. THE DECISION BELOW RESTS UPON AN INDEPENDENT AND ADEQUATE STATE GROUND.

There is a requirement of showing, for purposes of the Appellate Jurisdiction of the United States Supreme Court over State Court judgments, the presence of a federal question in the State Court proceedings and its determination by the State Courts. This results from Federal Statutes conferring upon the United States Supreme Court jurisdiction to review final judgments of a State Court. The statute conferring upon the United States Supreme Court jurisdiction to review, by appeal or Writ of Certiorari, final decisions of the highest state court in which a decision could be had, is contained in 28 U.S.C. § 1257, which reads as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By Appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repug-

nant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The foundation for 28 U.S.C. § 1257 extends as far back as § 25 of the Judiciary Act of 1789, which was passed by the first Congress of the United States. That statute described the issues upon which the United States Supreme Court might review a final judgment or decree of a state court in substantially the same way as these issues are described in 28 U.S.C. § 1257. The major difference between that statute and § 1257 is that there was a provision contained for a Writ of Error, which was abolished in 1928 and appeals were substituted therefor. The present provisions in 28 U.S.C. § 1257 were adopted in 1948.

It is essential to the jurisdiction of the United States Supreme Court in reviewing a State Court decision that the record affirmatively show not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, in that it was actually decided that the judgment as rendered could not have been given without deciding it, or in other words, that the State courts decision of the federal question was necessary to the determination of the cause. *Lynch vs. New York,* 293 U.S. 52, 79 L.Ed. 191, 55 S. Ct. 16 (1934); *Honeyman vs. Hanan,* 300 U.S. 14, 81 L.Ed. 476, 57 S. Ct. 350 (1937).

The City of Euclid, Ohio petitions the Supreme Court of the United States for a Writ of Certiorari pursuant to 28 U.S.C. § 1257(3).

The fundamental issue in a Petition for a Writ of Certiorari to the United States Supreme Court is whether the decision of the State Court rested on an independent and adequate state ground.

"If the judgment below rested on an independent and adequate state ground, the Writ of Certiorari should be dismissed as improvidently granted, *Wilson vs. Lowe's Inc.,* 355 U.S. 597, 21 L.Ed.2d 519, 78 S. Ct. 526 (1958), for 'our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights, and our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State Court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.'" *Herb vs. Pitcarin,* 324 U.S. 117, 125-126, 89 L.Ed. 789, 65 S. Ct. 459 (1945).

Page A1 is the first page of the appendix. On that page is the order of the Supreme Court of Ohio dismissing the appeal. On page A2, the second page of the Appendix, the Journal Entry and the Opinion of the Court of Appeals of the Eighth Judicial District of Ohio is found. It is this decision upon which rests the state court's judgments. The Assignments of Error found in that opinion clearly set forth that the convictions of the seven individuals were appealed under the unconstitutionality of the ordinance as it violates section 11, Article 1, of the Constitution of the State of Ohio. Consequently, the de-

cision of the Court of Appeals was reached under the Federal Constitution and "under the Ohio Constitution as well." On page A6 of the appendix, the Court of Appeals noted that the city has singled out and prohibited lawn signs on residential property which carried political messages. "The city has thereby impermissibly decided which viewpoints may and may not be conveyed through this medium of communication. This is exactly the type of content discrimination prohibited by the first amendment, . . . and prohibited by Article I, Section 11 of the Ohio Constitution."

The Appellate Court went on to state:

"We hold, therefore, that Euclid ordinance § 1743.32 (h) is invalid on its face. The ordinance impermissibly discriminates on the basis of content in violation of the first amendment to the United States Constitution . . . and Article I, section 11 of the Ohio Constitution and is therefore unconstitutional in every conceivable application."

Because the Ohio Court rested its decision on both state and federal grounds, either of which have been despositive, the Supreme Court of the United States would have no jurisdiction. *Fox Film Court vs. Muller,* 296 U.S. 207, 80 L.Ed. 158, 56 S. Ct. 183 (1935); *Enterprise Derogation District vs. Farmers Mutual Canal Company,* 243 U.S. 157, 164, 61 L.Ed. 644, 37 S. Ct. 318 (1917).

Because the Court of Appeals of the Eighth Judicial District of Ohio based its decision upon separate, adequate and independent state grounds this Court must not review that decision.

"If the State Court decision indicates clearly and expressly that it is alternatively based on bona fide sep-

arate, adequate, and independent ground, we, of course, will not undertake to review the decision." *Michigan vs. Long,* 103 S. Ct. 3469, 3476 (1983).

The State Court opinion, upon which the Supreme Court of the State of Ohio based its decision not to hear the case, based its decision on a state constitutional provision. ". . . by invoking a State constitutional provision a State Court immunizes its decision from review by this [United States Supreme] Court." *Patton vs. New York,* 100 S. Ct. 1371, 1387 63 L.Ed.2d 639 (1980).

III. CONCLUSION

Based upon the authorities cited and the reasons discussed above the United States Supreme Court should not review this case. Accordingly the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL

(Dated March 20, 1985)

Case Nos. 84-1836, 84-1837, 84-1838, 84-1839, 84-1840, 84-1841, 84-1842

THE SUPREME COURT OF OHIO

COLUMBUS

CITY OF EUCLID,

Appellant,

v.

GRACE MABEL, *et al.,*

Appellees.

JUDGMENT ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

/s/ FRANK D. CELEBREZZE
Chief Justice

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

(Dated September 27, 1984)

COURT OF APPEALS OF OHIO

EIGHTH JUDICIAL DISTRICT OF OHIO,
COUNTY OF CUYAHOGA

CITY OF EUCLID,
Plaintiff-Appellee,

vs.

GRACE MABEL (47856)
VICTORIA CICEK (47857)
CASIMIR CHOROMANSKI (47858)
JEANE ZUPANIC (47859)
CARMEN TARANTINO (47860)
PHYLLIS JORDAN (47861)
JIM FRATCHER (47862),
Defendants-Appellants.

NAHRA, J.:

Grace Mabel, Victoria Cicek, Casimir Choromanski, Jeane Zupanic, Carmen Tarantino, Phyllis Jordan and Jim Fratcher, appellants, were convicted of violating City of Euclid Ordinance § 1743.32(h),[1] which prohibits political

---

1. The challenged ordinance provides that:

> Political graphics shall be permitted for a period of not more than seventeen days before and five days after an election, with the size of the graphics not to exceed two square feet in area per graphic and such graphics to be located within an occupied residence as window graphics not to exceed two political graphics per residence.

Codified Ordinance Euclid § 1743.32(h) (1982).

lawn signs on residential property. Appellant Jim Fratcher had political advertising attached to the outside of his front storm door, and the remaining appellants had signs on their front lawns which advertised the election of a political candidate. After the trial court denied appellants' motions to dismiss, thus upholding the validity of the ordinance, appellants pled no contest. The trial court found appellants guilty, fined each appellant ten dollars, and placed all of them on probation. Appellants timely appealed.

I.

Appellants' first two assignments of error are that:

I. The trial court erred in overruling appellants' motion to dismiss the charges against appellants in that the ordinance upon which the City of Euclid's criminal prosecution was brought is a denial of appellants' rights to the freedom of speech secured by the First Amendment to the Constitution of the United States, and Section 11, Article I, of the Constitution of Ohio.

II. The trial court erred in overruling appellants' motion to dismiss the charges against the appellants in that the ordinance upon which the City of Euclid's criminal prosecution was brought is a denial of appellants' rights to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

These two assignments of error will be discussed together since appellants' equal protection argument, discrimina-

tion based upon content, lends itself to traditional freedom of speech analyses.

Section 1743.32(h) of the Codified Ordinances of the City of Euclid provides that:

> Political graphics shall be permitted for a period of not more than seventeen days before and five days after an election, with the size of the graphics not to exceed two square feet in area per graphic and such graphics to be located within an occupied residence as window graphics not to exceed two political graphics per residence.

Appellants contend that this ordinance denies free speech since it discriminates on the basis of content. The City argues that the ordinance is content neutral, that it represents a reasonable time, place or manner regulation, and that it serves compelling government interests.

The challenged ordinance has been declared unconstitutional under the federal constitution in *Meros v. City of Euclid*, No. C83-4353 (N.D. Ohio Aug. 17, 1984) and we reach the same conclusion here under the Ohio Constitution as well.

The United States Supreme Court has recently addressed similar challenges under the First Amendment[2] utilizing two different approaches. In some cases, the Court has applied a test to determine whether an ordinance is unconstitutional on its face. *See, e.g., Members of City Council v. Taxpayers for Vincent* (1984), 104 S. Ct. 2118.

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2. The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

In other cases, the Court has applied a balancing test to determine whether the government has a compelling interest which overrides the First Amendment rights of the private party. *See, e.g., Consolidated Edison v. Public Service Commission* (1980), 447 U.S. 530. We will apply both tests in our review of Euclid's ordinance.

The First Amendment to the United States Constitution and Article I, Section 11[3] of the Ohio Constitution protect the exercise of free expression. Freedom of speech, however, is not absolute, and several categories of expression have been exempted from First Amendment protection. *E.g., Miller v. California* (1973), 413 U.S. 15 (obscenity); *Bradenburg v. Ohio* (1969), 395 U.S. 444 (speech inciting immediate unlawful action); *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568 (fighting words). Political speech, unlike the unprotected categories of expression, is at the core of the First Amendment and is therefore "entitled to the fullest possible measure of constitutional protection . . . ." *Members of City Council v. Taxpayers for Vincent* (1984), 104 S. Ct. 2118, 2135.

A. Facial Analysis

An ordinance may be declared invalid on its face if it is unconstitutional in every conceivable application. *Taxpayers*, 104 S. Ct. at 2124. It is well-established that generally the government cannot restrict expression on

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3. Article I, Section 11 provides, in relevant part, that "[e]very citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge, the liberty of speech; or of the press." Ohio Const. Art. I, § 11.

the basis of its subject matter.[4] *See, e.g., Police Department v. Mosley* (1972), 408 U.S. 92, 95. "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison v. Public Service Commission* (1980), 447 U.S. 530, 538. As a result, a City may not select a particular type of speech for differential treatment. *Metromedia, Inc. v. San Diego* (1981), 453 U.S. 490, 514.

In this case, the City has singled out and prohibited lawn signs on residential property which carry political messages. Real estate lawn signs and other commercial lawn signs are permitted. The City has thereby impermissibly decided which viewpoints may and may not be conveyed through this medium of communication. This is exactly the type of content discrimination prohibited by the First Amendment, *see Metromedia,* 453 U.S. 490; *Carey v. Brown* (1980), 447 U.S. 455; *Norton Outdoor Advertising v. Arlington Heights* (1982), 69 Ohio St. 2d 539, and prohibited by Article I Section 11 of the Ohio Constitution.

The City argues, however, that the ordinance is content-neutral since it does not discriminate against any one particular political view in favor of another. The United

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4. Only in two narrowly-drawn exceptions were government regulations based on content upheld. In *Greer v. Spock* (1976), 424 U.S. 828, and *Lehman v. Shaker Heights* (1974), 418 U.S. 298, private parties asserted a right of access to public facilities. These cases were subsequently distinguished and held inapplicable to challenges by a private party seeking to use his own property to express his views rather than seeking access to public facilities. *See Consolidated Edison v. Public Service Commission* (1980), 447 U.S. 530.

States Supreme Court specifically rejected an analogous concept of neutrality in *Consolidated Edison.* In that case, the Public Service Commission argued that because its prohibition against the discussion of nuclear power, both pro and con, in utility bill inserts was related to the broad subject matter rather than to the views of a particular speaker, its ban should be upheld. In rejecting this argument, the Supreme Court stated that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison,* 447 U.S. at 537; *see also Metromedia,* 453 U.S. at 518. We similarly reject this argument.

The City further contends that its ordinance is a reasonable time, place or manner restriction because it merely regulates the size and location of political signs by permitting two political messages in residential windows. There is no question that reasonable time, place or manner regulations may be imposed upon the various methods of speech to prevent the frustration of legitimate government goals. *See, e.g., Heffron v. Int'l Soc. for Krishna Consc.* (1981), 452 U.S. 640. However, these regulations must apply to all speech irrespective of content. *Erznoznik v. Jacksonville* (1975), 422 U.S. 205, 209. Therefore, in order to withstand a constitutional challenge, "time, place, or manner restriction[s] may not be based upon either the content or subject matter of speech." *Consolidated Edison,* 447 U.S. at 536. Because the City's ordinance regulates on the basis of subject matter, *i.e.,* only political graphics are so regulated, the ordinance cannot be upheld as a content-neutral reasonable time, place or manner regulation.

We hold, therefore, that Euclid Ordinance § 1743.32 (h) is invalid on its face. The ordinance impermissibly discriminates on the basis of content in violation of the First Amendment to the United States Constitution, *Meros v. City of Euclid,* No. C83-4353 (N.D. Ohio Aug. 17, 1984), and Article I, Section 11 of the Ohio Constitution and is therefor unconstitutional in every conceivable application.

B. Competing Interests Analysis

An ordinance which restricts the speech of a private individual "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling [government] interest." *Consolidated Edison,* 447 U.S. at 540. The City contends that its ordinance prevents a public nuisance, avoids and prevents local crime, preserves safe highways, and preserves the aesthetics of the community. The trial court, in its opinion upholding the City's ordinance, stated that:

> automobiles have been driven up across sidewalks over lawns to strike down political graphics emplanted in front lawns that political graphics have been thrown through windows, that they have been torn down by vandals, thrown out into the streets where the political graphics are run over by automobiles causing damage to persons and property. The police are constantly called during the political season when such graphics are posted in front lawns as result of political graphics being vandalized.

Trial Op. at 2.

We conclude that none of the government interests advanced are compelling in order to suppress the political

speech of individuals through the use of lawn signs on their own property. Lawn signs as a medium of communication are unique. The United States Court of Appeals for the Ninth Circuit, in striking down an ordinance which, among other things, banned temporary signs from residential areas, stated that:

> the First Amendment interests involved in the display of political posters adjacent to public thoroughfares are substantial. Moreover, means of political communication are not entirely fungible; political posters have unique advantages. Their use may be localized to a degree that radio and newspaper advertising may not. With exception of handbills, they are the least expensive means by which a candidate may achieve name recognition among voters in a local election.

Baldwin v. Redwood City (9th Cir. 1976), 540 F.2d 1360, 1368 (footnote omitted). Similarly, the United States District Court for the Northern District of California expounded on the importance of political signs by stating that:

> The temporary political sign offers special advantages to the candidate seeking public office and to the advocate promoting a particular position on a state ballot measure. These signs are a relatively inexpensive means of campaigning. Their use can be localized so that certain areas which the advocate wishes especially to reach may be targeted. A candidate or partisan can use the temporary sign to place a name or an issue before the public. In a campaign for political office, political posters can be effectively utilized to build up the candidate's name recognition

> and to establish him as a serious contender. The temporary political sign has special value to the non-incumbent or relatively unknown candidate who can use the signs to identify his name among the electorate. The less well-known candidate can test the waters to see whether his candidacy is viable before going to more expensive media such as television or radio.

City of Antioch v. Candidates' Outdoor Graphic Serv. (N.D. Cal. 1982), 557 F.Supp. 52, 59. We agree with the federal courts and recognize the importance of political signs as a medium of communication.

In *Peltz v. South Euclid* (1967), 11 Ohio St. 2d 128, the City banned all political signs except bumper stickers. The Supreme Court of Ohio declared the ordinance unconstitutional. *See also Pace v. Walton Hills* (1968), 15 Ohio St. 2d 51. With regard to aesthetics, the Court stated that:

> The ordinance in question sweeps away the right of a property owner to express his opinion on his own property. Defendant's interest in aesthetics does not reasonably outweigh the loss of plaintiff's liberty of speech.

Peltz, 11 Ohio St. 2d at 133; *see also Baldwin,* 540 F.2d at 1370 (less restrictive means available); *Antioch,* 557 F. Supp. at 59; *State v. Miller* (1980), 83 N.J. 402; *City of Cleveland v. Walters,* No. 39302 (8th Dist. Ct. App. Feb. 15, 1979); *but cf. Members of City Council v. Taxpayers for Vincent* (1984), 104 S.Ct. 2118 (city may prohibit the posting of political signs on public property for aesthetic reasons).

The Supreme Court of Ohio went on to say in *Peltz* with respect to traffic that:

> The ordinance is not saved by its purpose to eliminate traffic hazards on main thoroughfares and at street intersections. The proscription is against *all* political signs, irrespective of location. Even the regulation of traffic may not be attempted by means which invade explicit constitutional liberties. *Natl. Assn. for Advancement of Colored People v. Alabama,* 377 U.S. 288, 12 L.Ed. 2d 325, 84 S. Ct. 1302. There is nothing in this record to convince us that a political sign is a greater traffic hazard than all the other features of the landscape which, purposely or not, tempt the attention of drivers. Furthermore, it is difficult to conceive that a political sign, reasonable in size, structure and appearance, would constitute a hazard greater than "bumper stickers" which are expressly permitted by another ordinance of South Euclid, and which, by definition, are not restricted to a specific locality.

Peltz, 11 Ohio St. 2d 133-134.

Nor can the City justify its ordinance suppressing free speech on private property by stating that political lawn signs on residential property create public nuisances or attract vandals. It is within the power of the City to enact legislation regarding the maintenance of political lawn signs, the removal of obsolete signs, and the defacing or vandalizing of political lawn signs. *See Peltz,* 11 Ohio St. 2d at 133. The City has enacted similar ordinances with respect to commercial signs. *See, e.g.,* Codified Ord. Euclid § 1743.17.

For all of these reasons, we conclude that the City has failed to demonstrate interests which override the private individual's right to free political expression through the use of lawn signs on his own property. Therefore, under both tests set forth by the United States Supreme Court and the tests of Ohio, we find the City's ordinance invalid. Appellants' first two assignments of error are sustained.

II.

Appellants' third assignment of error is that:

> III. The trial court erred in taking judicial notice of facts which should have been proven to the trier of fact.

The trial court in its opinion denying appellants' motions to dismiss stated that:

> From the arguments brought before this court, from prior cases brought before this court involving political graphics and from personal experience, the Court takes notice that automobiles have been driven up across sidewalks over lawns to strike down political graphics emplated in front lawns, that political graphics have been thrown through windows, that they have been torn down by vandals, thrown out into the streets where the political graphics are run over by automobiles causing damage to persons and property. The police are constantly called during the political season when such graphics are posted in front lawns as a result of political graphics being vandalized.

Trial Op. at 2. Appellants contend that these facts are not of the type that are judicially noticeable and that these facts were judicially noticed without informing appellants.

The record indicates that at the hearing on their motion, appellants, through their counsel, admitted that lawn signs are vandalized and cause litter. Tr. 5-6. These facts are therefore undisputed, and the trial court may properly take judicial notice of undisputed facts. *See Brown v. Cleveland* (1981), 66 Ohio St. 2d 93, 98. In addition, the record is void of any request by appellants for an opportunity to be heard as to the propriety of the court's action pursuant to Ohio R. Evid. 201(E). Consequently, this assignment of error is overruled.

III.

Appellants' last assignment of error is that:

> IV. The trial court erred by considering as evidence the affidavits submitted by the city prosecutor, thereby denying appellants their rights to confront the witnesses against them secured by the sixth amendment to the constitution of the United States.

The criminal rules of procedure permit affidavits to be attached to motions. Ohio R. Crim. P. 47. In fairness, the responding party is also permitted to attach affidavits to his brief in opposition. No confrontation rights are denied by this rule in this situation. Therefore, the trial court did not err in considering the affidavits attached to the City's brief in opposition to appellants' motions to dismiss. Accordingly, this assignment of error is overruled.

The judgment of the trial court is reversed, and this cause is remanded for proceedings consistent with this opinion.

This cause is *reversed and remanded to the Euclid Municipal Court for further proceedings consistent with this opinion.*

It is, therefore, considered that said appellant(s) recover of said appellee(s) *their* costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PARRINO, *P.J.*
RUSSO, *J.*, Concur.

/s /JOSEPH J. NAHRA,
Judge

UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO CONSTITUTION

ARTICLE I

§ 11 [Freedom of speech and of the press; libel.]

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged was libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted. (See Const 1802, Art VIII, § 6.)

EUCLID CODIFIED ORDINANCES

§1743.32(h):

> Political graphics shall be permitted for a period of not more than seventeen (17) days before and five (5) days after an election, with the size of said graphics not to exceed two square feet in an area per graphic and said graphics to be located within an occupied residence as window graphics not to exceed two political graphics per residence.